

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAY 19 1941

IN THE

Joseph W. Stewart
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1941.

—
No. 7856
—

766

JOHN B. KASHOUTY, *Appellant*,

v.

ANTHONY DEEP, JR., ET AL., *Appellees*.

—
**Appeal from the District Court of the United States for the
District of Columbia.**
—

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1941.

No. 7856

JOHN B. KASHOUTY, Appellant,

vs.

ANTHONY DEEP, JR., WILLIAM DEEP, By their mother and next friend, Mrs. Anthony Deep, ANNIE GABRIEL, ST. GEORGE SYRIAN ORTHODOX CHURCH SOCIETY OF WASHINGTON, D. C., JOSEPH S. SADO, JOSEPHINE D. SMITH, JEAN D. KELLY, MARY D. WILSON, ANNE DEEP, FAYE DEEP, ABRAHAM G. DEEP, JOHN G. DEEP, Appellees.

**Appeal from the District Court of the United States for the
District of Columbia.**

JURISDICTIONAL STATEMENT.

This action was brought in the District Court under its general jurisdiction of matters in which equitable relief is sought (Code of the District of Columbia, Title 18, Section 44). The complaint (Appellant's App. 2-5) sought to establish a trust on property described in it. It was followed by an amended complaint (Appellant's App. 6-8). While none of the defendants were residents of the District, the property involved was situated in this jurisdiction, and accordingly to that extent jurisdiction attached (Code of the District of Columbia, Title 24, Sec. 378).

The jurisdiction of this Court is invoked under the general provision authorizing appeals from final judgments of the District Court by which the appellant feels aggrieved (Code of the District of Columbia, Title 18, Sec. 26). The appeal was noted in due course (Tr. 219) from the judgment of the lower court (Tr. 218).

STATEMENT OF CASE.

The original complaint was a civil action filed by plaintiffs who were the beneficiaries and the executor named in the will of Fannie Deep (Appellant's App. 2-5). A copy of the will was attached to the complaint. The complaint was designed to establish a trust on Lot 194, Square 4202 in the District of Columbia, held by the defendant, John B. Kashouty (appellant here), in favor of the persons named in the will of Fannie Deep, or, should the will be refused admission to probate, in favor of the heirs-at-law of Fannie Deep, on the ground that the deed to the property had been secured from her by fraud and undue influence.

Leave of court having been obtained, an amended complaint was filed, in which one of the beneficiaries and the executor named in the will were dropped as parties plaintiff (Appellant's App. 6-8). The purpose of the amended complaint, as in the instance of the original complaint, was to establish a trust upon the property in favor of the heirs-at-law of the decedent on the ground that she was of unsound mind and incapable of executing a valid deed and on the further grounds of undue influence and lack of consideration. The charges of fraud were abandoned.

The defendant Kashouty filed a motion under Rule 12 of the Rules of Civil Procedure to dismiss the amended complaint (Appellant's App. 8-9) on the ground (1) that the establishment of the invalidity of the will was a necessary element of plaintiffs' case, and could not be effected by the District Court except when sitting as a Probate Court, and (2) that this action could be maintained only by an executor or administrator, neither of which had ever been appointed.

This motion was overruled (Appellant's App. 10), and the defendant Kashouty filed an answer in which he denied that Fannie Deep was of unsound mind and incapable of executing a valid deed at any time, or that it was obtained by undue influence, and further alleged that it was not without consideration (Appellant's App. 10-11).

On the trial the plaintiffs' evidence showed that the decedent, Fannie Deep, was an elderly woman whose principal medium of expression was Arabic, although she spoke some English. She had lived with her son, a physician, Dr. Anthony Deep, until his death in December of 1937. Her daughter-in-law, the physician's wife, who testified, said that the decedent was "unbearable" (Tr. 69). The source of her funds appear to have come from an insurance policy in her favor on the life of her son Dr. Deep. The social background of the decedent did not fit into the daughter-in-law's household (Tr. 71-72) and she was more or less a jarring note. She had been operated on prior to 1930 for gallstones (Tr. 73) and was apparently very exacting about her diet (Tr. 70-71). She continued to complain about the result of her operation and also of stomach aches (Tr. 75). She dressed in an old-fashioned style, but wore clothes of her own choice.

The Sister Superior of the Sacred Heart Home at Hyattsville testified that the decedent resided at the Home for about two weeks in May of 1938 (Tr. 77). She left because she did not fit in with the other guests and residents (Tr. 78). This witness testified that she was very determined and obstinate at times (Appellant's App. 15). She went to chapel and to mass, however, while staying at the Home (Tr. 79).

Mr. Joseph S. Sado, a member of the bar, testified that he had known her for several years socially and that he knew her son Dr. Deep quite well. He had performed some legal services for her with regard to this property, notably in connection with straightening out the title, and saw her a number of times in March of 1938 (Tr. 82-83). He verified the fact that she was impatient and difficult to handle at

times and was obstinate about things and her affairs in general (Appellant's App. 15). She left Washington about the middle of July of 1938 to go to Geneva, N. Y., and about three weeks or a month afterwards she came back, at which time he saw her for a short period (Tr. 84). When she first left Washington to go to Geneva, he handed her all of her papers, title papers and will, placing them in a large envelope, together with \$200.00 in cash (Tr. 87).

Her grandson Mike Deep, son of the daughter who was principal beneficiary under the will, testified that she had moved in with his family about two days after her son's death in 1938, and stayed with him about two weeks. They moved to the house they bought with her and for which she paid (Tr. 90-91). This is the property involved in the suit. He said that the decedent had raised him from a baby and that he had known her all his life (Tr. 93). He said that she was irritable, but also that she, together with his two small children and wife, lived with him in three rooms (Tr. 96-97). He appears to have been raised entirely by the decedent and had never known of his mother having lived in the household of the decedent during his lifetime (Tr. 96). It may be commented in passing that this witness' testimony reflects little credit upon him in light of the decedent's apparently having stood in *loco parentis* to him. He was unable to state his own mother's name without examining a paper, and communicated with her but once in a great while (Tr. 97).

The attorney who prepared the deed (Appellant's App. 17), M. Maurice Chacchia, also testified as a witness for the plaintiffs. He is a member of the New York bar. He was the only witness for the plaintiffs whose testimony could in anywise bear directly upon the issue of undue influence. He said that he did not get the instructions to prepare the deed through the defendant Kashouty but talked with the decedent herself; that she could speak enough English to make herself understood and that during his conversation with her, which occurred in the home of the defendant Ka-

shouty, the defendant and his wife were in the room some part of the time at least, and may have been there all the time. He had done work for the defendant Kashouty and had known him for at least twenty years. He first met the decedent in September of 1938 near the same day that the deed was drawn. He had been first called by the defendant Kashouty at the instance of the decedent some time around the middle of August, but was away for approximately a month after that time and did not get to take the matter up. When he finally went to the defendant's house accompanied by his secretary (who is now his wife), he was given information by the decedent and she handed him the deed from which he obtained the necessary description to draw the deed involved in this case. He then left the Kashouty house and went to his office to prepare the deed. He afterwards returned, apparently the same evening, read the deed to her, and had her affix her mark. He understood that the priest was supposed to be there, but was not, and believes that it was several days later before the priest was available, at which time he was called back to the house so that the priest might witness the deed. He testified that he again read the deed to her, explaining it to her in English as he went along, and that she and the priest would carry on a conversation from time to time in Syrian, and when that was finished she acknowledged that the mark previously made was hers and that it was the deed she wished to make. He talked to her in English both times. On the second visit the priest witnessed the deed and his secretary also signed as a witness. He further took the acknowledgment of the deed. As he recalled, her mark was affixed by herself without any physical aid. The place of these meetings was in the living room of the Kashouty home, where the decedent was seated in a chair in the bay window. She had predominantly gray hair, not entirely gray, and was perhaps a little below medium in stature. She was sitting down at the time and he did not recall whether she stood up or not. She was of dark complexion and somewhat wrinkled, being a typical woman of that age. She and the attorney discussed the matter of the

instrument which was to be drawn. She told him that after her son Dr. Deep had died no one else would be as good to her as her nephew, the defendant, of whom she spoke affectionately, saying that he "now is my son. He is like my son. I live here with John and I want him to have this house." She told him about the house and also on one occasion about her money in the bank. He discussed the advisability of making a will as against a deed and she told him that she had already made a will. She told him further that the defendant was going to take care of her for the rest of her life, for which she was going to turn over the property now. He asked her if she wanted a written agreement providing that the defendant should support her for the rest of her life and advised her that it was customary to make such agreements, but she would hear nothing of it. She impressed the attorney as being intelligent and had ability to comprehend what her knowledge of English would permit her to understand. The witness further explained to her that a deed meant a present conveyance whereas a will would not convey until death and that a will might be revoked at any time prior to death. She later made inquiry of this witness as to what she should do about the will previously executed, and he advised her that inasmuch as she had transferred her property it would be unnecessary for her to take any further step in connection with it. He also said that she was a definitely set and apparently determined type of person. He read the deed to her very carefully both at the time of its original preparation and at the time it was witnessed by the priest. The defendant Kashouty took no part in the transaction. The priest read the deed to her in Arabic at the time when he was present. He also testified that there was some \$1100 transferred into a joint account in her name with the defendant, but that this took place subsequent to the execution of the deed. (Appellant's App. 17-25.)

The defendant's case disclosed that the defendant himself was a nephew of the decedent, being the son of her sister. He had known her since 1902 when he came to the

United States (Appellant's App. 25-26). The entire family were natives of Syria (Appellant's App. 26-28). There had been times when the decedent's means of support were by the peddling of laces, towels, and goods of that character, which she would go about the city selling from house to house. The defendant in his youth had been on close terms with the decedent and at one time lived in the same house with her and later was a close neighbor. He left Washington, however, in 1914, and went to Geneva, N. Y. He had seen the decedent frequently since that time, however, as he came to Washington every year or so to visit his mother (Appellant's App. 29). It appears that the daughter of the decedent and the decedent had quarreled over the daughter's marriage. The daughter is the mother of the witness Mike Deep who testified for the plaintiffs (Appellant's App. 28). The decedent appeared to have been ambitious for her son Anthony Deep to study medicine. She made a trip to Geneva, N. Y. and raised a fund during the time that he was in college in order to help him with his studies. Decedent's friends in Geneva and the defendant contributed toward this fund. She spent about six months in Geneva at that time, living with the defendant and also with his mother-in-law (Appellant's App. 29). During the time when the decedent lived with her son, she complained to the defendant about the treatment which she received from her daughter-in-law and he in turn would endeavor to placate her. After the son committed suicide in 1937 (Appellant's App. 30-32), the decedent requested the defendant to permit her to come and make her home with him. This happened immediately following the funeral. The defendant, however, advised her to go and live with her son George in Lynchburg. She argued that she would be unable to live with him because she had tried before and it was not satisfactory. He urged her to do this and at least to try to see whether she couldn't get along with him, and if she could not, she might write to him, the defendant, in Geneva (Appellant's App. 32). The defendant tried as much as he could to get her to go with her son. It will be remembered

that no provision is made for this son in the will (Appellant's App. 4-5).

The defendant did not see her again until July of 1938 when she came unannounced to his home in Geneva, N. Y. and announced her intention of making her home with him. The record indicates an obvious reluctance on the part of the defendant to take on this addition to his household (Appellant's App. 32-33). However, he agreed that she might stay. She subsequently returned to Washington a short time afterward, remaining away from Geneva about two nights. She returned immediately by railway, bringing with her her trunk and apparently her other personalty. She had made this trip alone (Appellant's App. 33-34).

During her stay in Geneva she complained of stomach trouble but she never really stayed in bed. She would be in and out and go about attending to small domestic duties. She had a large number of friends there whom she saw very frequently. They would come to visit her and she would visit with them (Appellant's App. 34-35). She was a member of the Greek Orthodox Church in Geneva and very active in attendance (Appellant's App. 35).

The defendant's family took the decedent riding from time to time and prepared some special foods which she seemed to like and that she could eat. (Appellant's App. 47). She wanted to work when she was there but the defendant's wife urged her not to do anything. She would, however, fix her bed now and then and do little things like that. The defendant's wife helped her to bathe because she was afraid of slipping in the tub (Appellant's App. 47). She apparently had the same social background as the other women who were her friends living in and about Geneva (Appellant's App. 48). She seemed to have an excellent memory as to the day of the year and as to matters which had happened in previous years (Appellant's App. 49).

The defendant's testimony as to the circumstances of the execution of the deed was substantially the same as that shown in the plaintiffs' case, although he testified that he cautioned her not to be hasty in turning over the property

(Appellant's App. 37-38). He did not, however, tell the attorney whom he summoned the nature of the instrument to be drawn, because he was apparently not sure whether she wanted a deed or a will (Appellant's App. 41). This was determined between the decedent and the attorney.

One of the witnesses to the deed, Mary Annonny, who subsequently married the attorney who prepared the deed, testified that at the time of its preparation the decedent went into considerable detail in describing the property. She said that at the time the deed was executed the decedent talked quite a lot and seemed quite strong. The only physical ailment she appeared to have was that she coughed quite a bit when she talked. (Appellant's App. 51-52.)

The clergyman who witnessed the deed, Rev. Mr. Massabini, testified that the decedent was a member of his Church and of the ladies club; that she attended every Sunday and holidays, and that he frequently visited her. She had discussed this property with him and told him that she wished to reward the defendant Kashouty because he was taking care of her, and he witnessed the deed. He read the deed to her in Arabic and asked her whether she wished to turn the property over to the defendant Kashouty. She said that she did, and was willing to give it to him because he was taking good care of her. He said that in her native tongue of Arabic she could speak freely and fluently. He said that he last saw her the day she went to the hospital. She reaffirmed her satisfaction of having given this property to the defendant, to the clergyman, on the day she went to the hospital, three days before her death. Her memory was excellent. (Appellant's App. 54-61.)

In October or November of 1938 she was taken seriously ill. At that time the defendant took her to the Clifton Springs Sanitarium for examination. She was there several days, but then decided that she wished to return home (Appellant's App. 35), and the defendant brought her back. Around the latter part of November or December she became weak and the defendant took her to the Geneva Hospital, where she insisted upon having an operation. Her

physician and the defendant each attempted to dissuade her from this, and she in fact died before the operation was performed (Appellant's App. 35-37).

The deposition of Dr. E. Herndon Hudson, who was attached to the Clifton Springs Sanitarium, was offered (Appellant's App. 61-62) to show that this witness, who had spent some 19 years in Syria and who was familiar with this type of person, said that she struck him as a typical untidy garrulous elderly Lebanese woman with a pretty definite mind of her own. (Appellant's App. ⁶⁴66) The testimony of this physician was excluded by the Court.

The trial court found (Appellant's App. 12-14) that the decedent was evidently over 80 years of age and in ill health and enfeebled condition; that she was susceptible of the influence of one whom she trusted; that she was largely ignorant of the English language, signing her name by a mark, and concluded that the execution of the deed was not her free and voluntary act, but was procured by undue influence, and accordingly set aside the deed.

STATUTES INVOLVED.

Code of the District of Columbia, Title 9:

“20. TESTIMONY OF PHYSICIANS.—In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: *Provided*, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure shall be required in the interests of public justice. (May 25, 1896, 29 Stat. 138, c. 245; Mar. 3, 1901, 31 Stat. 1358, c. 854, sec. 1073; Mar. 3, 1901, 31 Stat. 1434, c. 854, sec. 1636.)

Code of the District of Columbia, Title 18:

"123. **PLENARY JURISDICTION.**—The supreme court holding a special term as a probate court shall have plenary jurisdiction to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained. (Mar. 3, 1901, 31 Stat. 1208, c. 854, sec. 117.)

Code of the District of Columbia, Title 24:

"SECTION 31. **ACTIONS SURVIVE IN FAVOR OF OR AGAINST REPRESENTATIVE OF DECEASED PARTY; INJURY TO PERSON OR REPUTATION.**—On the death of any person in whose favor or against whom a right of action may have accrued for any cause except an injury to the person or to the reputation, said right of action shall survive in favor of or against the legal representatives of the deceased; but no right of action for an injury to the person, except as provided in title 21 of this code, or to the reputation, shall so survive. (Mar. 3, 1901, 31 Stat. 1227, c. 854, sec. 235.)

STATEMENT OF POINTS.

The following points, each of which the appellant considers error by the Court below, are relied upon in this appeal:

1. The District Court erred in finding that the deed had been procured by undue influence in the absence of any evidence thereof.
2. The District Court erred in declaring the deed of the property to the defendant Kashouty invalid.

3. The District Court erred in failing to grant the defendant's motion to dismiss the amended complaint on the grounds that:

(a) The determination of the validity or invalidity of the will is a condition precedent to the bringing of this suit, and the Court had no jurisdiction to determine this fact in this proceeding.

(b) This action can be prosecuted only by an administrator or executor.

4. The District Court erred in excluding from evidence the deposition of E. Herndon Hudson when offered by the defendant as part of his case during the trial.

SUMMARY OF ARGUMENT.

- A. There Was No Evidence of Undue Influence.
- B. There Is No Presumption of Undue Influence in the Case of a Deed.
- C. There Was Consideration for the Execution of the Deed.
- D. Only An Executor or Administrator Could Properly Prosecute This Action.
- E. The District Court Had No Jurisdiction to Entertain This Suit.
 - 1. The Determination of the Validity or Invalidity of the Will Is a Condition Precedent to the Bringing of This Suit.
 - 2. The Question of the Validity of the Will Could Not Be Properly Raised Before the Lower Court.
- F. A Physician May Testify as to Matters Unrelated to His Professional Capacity to Decedent.

ARGUMENT.**A. There Was No Evidence of Undue Influence.**

The plaintiffs' amended complaint was filed on the theory that both the deed and the will were invalid because of the mental incapacity of deceased, and on the further proposition that the deed was invalid because of undue influence and lack of consideration. The plaintiffs' proof was directed principally to the issue of mental capacity. Their first witness, Mrs. Najla Deep, testified only as to the conduct of the decedent while residing with her husband, Dr. Anthony Deep, and herself (Tr. 68-75). Their second witness, Sister Bellina, testified only to the fact of the decedent's stay at the Sacred Heart Home, and her conduct while there (Tr. 76-79). Their next witness, Joseph S. Sado, decedent's Washington attorney, testified regarding the transfer of the property in question to decedent's name; the execution of her will; giving her the title papers, will, and all her cash before she first went to Geneva, and before her return to Washington several weeks later. Mike Deep, her grandson, testified concerning her two-week stay with him and his family in their very limited quarters, the utter lack of harmony while she was there, her purchase of the property, and her conduct in general (Tr. 89-99). Mr. Maurice Chacchia, their next witness, an attorney from Geneva, N. Y., testified that Mr. Kashouty called and told him his aunt wanted some information; that nearly a month later, Mr. Kashouty called him again, at which time he visited Mrs. Deep, was told by her that Mr. Kashouty was like her son, and she wanted him to have the property. She gave him the deed which she had and from which he obtained the description necessary to prepare the present deed. He later returned to the house with the deed to Mr. Kashouty, at which time he read it to her and she affixed her mark. A day or so later, Father Massabini was there, and he again read the deed to her, during which reading decedent and Father Massabini carried on conversation in Arabic, and Father Massabini translated it to her; that she then acknowledged her mark, and said that it was

the deed she wanted to make. She inquired of Mr. Chacchia about cancelling the will, and he told her that would not be necessary; that she said Mr. Kashouty was going to care for her the rest of her life, for which she was deeding the house to him. He asked her if she didn't want a written agreement with Kashouty, but she said she didn't, because she trusted him, and if she didn't, wouldn't be there. He testified that Mr. Kashouty took no part in the transactions. The plaintiffs' last witness was Mrs. Josephine Neams, who testified only as to the decedent's conduct while living with her.

It is thus obvious that the only witness for plaintiff who could possibly have testified as to the relationship between Mr. Kashouty and the decedent was Mr. Chacchia, and his testimony shows an intense desire on the part of the decedent to transfer her property to Mr. Kashouty in return for his kindness to her up to that time and his promise to care for her the rest of her life. It does not even suggest that Mr. Kashouty or anyone else encouraged her to make the transfer of the property, much less that undue or improper influence was brought to bear upon her.

Nor did plaintiffs' case show any fact even tending to show decedent was susceptible to anyone's influence. Three of their own witnesses testified she was stubborn and had a mind of her own. Their testimony further shows that she had the deed with her when she first went to Geneva, and that she came back to Washington for a week or so after staying a month there, and then returned to Geneva. If she were susceptible of undue influence, or if it were being practiced on her, it is reasonable to suppose the transfer would have been effected before her trip to Washington, or at least that steps would have been taken to insure her return. And it is of importance that the plaintiffs' case shows that this old woman was unable to find a suitable home in Washington, that everyone obviously considered her a burden, and that she was shunted from place to place.

The defendant's case is printed in full in the appendix. The details of the execution of the deed were fully spread

upon the record, and every witness to it, with the exception of one, testified with regard to it—the lawyer who was the scrivener of the deed, the priest who witnessed it, one other witness, the lawyer's secretary, and the defendant and his wife. There is not one scintilla of evidence of any irregularity or improper means or practice. The defendant's entire case shows the kindness and consideration with which decedent was treated by Mr. and Mrs. Kashouty, that she was given every personal and medical attention. Her statements of appreciation for this to her priest and Mr. Chacchia show her reaction to this kindness. The record shows that she had access to the company of other women of similar age and background, and was not the social misfit in Geneva that the plaintiffs' witnesses considered her here. It gives rise to an inference that she was in a happy, congenial atmosphere in contrast to the lonely and unhappy existence the plaintiffs had allowed her to spend when she had no home.

The plaintiffs would have the court disbelieve all of the evidence of the witnesses, their own as well as the defendant's, and then to devise an imaginary situation in which the free will of the decedent had been destroyed. They complain that no evidence was available to them concerning the transaction, but the record discloses that the decedent had friends in Geneva of her own age whom she visited and who visited with her. These people were equally available to the plaintiffs, and, had the transaction been tinged with an aspect such as the plaintiffs claim, they undoubtedly would have known the circumstances. The only influence which the record discloses was one of kindness, attending to the wants of the decedent, giving her the special food which she seemed to require and enjoy, assisting her to bathe when she was in fear of falling in the bathtub, taking her for automobile rides, and so on. This is not fraud or coercion, threats or importunity. *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

There was complaint by the plaintiffs that the defendant did not notify decedent's other relatives of this deed. If

there were any duty in this case, it lay upon the plaintiffs to inform themselves of the decedent's condition, both as to her health and her property. There is no word in the record that they ever did this or ever had any contact with her after she left Washington, although they apparently knew where she was and now contend that she was mentally incapable and physically infirm. The decedent returned to Washington, after the conveyance of the property to the defendant had been proposed in consideration of his providing for her. She had opportunity then to consult with other counsel. Other members of her family were there and they had opportunity on their part to consult with her. She saw her former attorney at that time.

None of these facts can possibly justify the slightest inference of any undue influence practiced upon her (Appellant's App. 13-14) by the defendant, John B. Kashouty. In the court's opinion, it stated that "under all the facts, I find undue influence." The lower court's finding in this respect was necessarily based upon a presumption of undue influence. Indeed, the court, at the conclusion of the evidence and arguments, requested briefs on the question of whether or not there was any presumption of undue influence, and withheld its opinion until after these had been submitted.

B. There is No Presumption of Undue Influence in the Case of a Deed.

The rule in this District is that a confidential relation existing between the grantor and grantee does not give rise to a presumption of undue influence. It was so held in *Madre v. Gaskins*, 39 App. D. C. 19, pp. 27 and 28. In that case the deed was executed by an elderly woman about ten days prior to her death. The conveyance was made to a younger woman who lived with the decedent in the latter's home. It was made out of consideration for the grantee's agreeing to support the grantor for the balance of her life. There was a violent conflict of testimony as to the facts in

the case. The Court of Appeals summed up and stated the rule as follows:

“Becoming infirm physically, and being unable longer to pursue her calling, it was not unnatural that she should desire to make definite plans for the future. There is not a scintilla of evidence that any coercion whatever was practiced upon her. For ought that appears in the record, the arrangement that resulted was not only entirely voluntary on the part of the decedent, but one initiated by her. Assuming that the relationship between the decedent and the defendant was such as to enable the latter to exercise influence over the former, and hence to require that any disposition by the former of her property for the benefit of the latter should be closely scrutinized, it nevertheless remains true that the burden is upon the plaintiff to establish her case; in other words, the rule in this jurisdiction places the burden of proof in such a case upon the plaintiff. *Jenkins v. Pye*, 12 Pet. 241, 9 L. ed. 1070; *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001, *Ralston v. Turpin*, 129 U. S. 663, 32 L. ed. 747, 9 Sup. Ct. Rep. 420.”

And then further:

“After reviewing the evidence, the court, in *Towson v. Moore*, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332, ruled that the existence of confidential relations between donor and donee, or grantor and grantee, require a careful scrutiny of the circumstances attending the transaction, to ascertain whether undue influence has been practiced. But, said the court, ‘It (the gift or conveyance) cannot be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside the court must be satisfied that it was not the voluntary act of the donor.’ ”

The relation existing between the grantor and grantee here was little different in its entire aspect from that which existed in *Madre v. Gaskins*. There was no professional relationship such as that of attorney and client or banker and customer. It was one of blood, and while friendly, was not continuous or close during the immediate years prior

to the decedent taking up residence with the defendant at his home.

The same rule is followed in *Gibson v. Collins*, 55 App. D. C. 262, 4 F. (2d) 874 which was also a case challenging the validity of a deed. The grantor had lived in the household of the grantee, her daughter-in-law, 25 years prior to the time of the execution of the deed. It was said (p. 265):

“While the question of fraud is entirely eliminated from the case, the court below seems to have been influenced to some extent by the fact that this transaction was brought to the attention of the mother and carried out at a time when she was bowed down with grief over the death of her son. Actions portraying gratitude for services rendered to an aged person under the circumstances here detailed, and the relations which had existed between the mother, her son and daughter-in-law over a period of twenty-five years, do not constitute undue influence.”

Mackall v. Mackall, 135 U. S. 167, 34 L. ed. 84, 10 Sup. Ct. 705, is perhaps one of the leading cases upon the subject arising in this District. In this instance the deed was made to one son of the grantor a few days before his death. The court in reviewing the subject quoted from the notes to the case of *Small v. Small*, 4 Me. 220, as follows:

“Influence gained by kindness and affection will not be regarded as ‘undue’ if no imposition or fraud be practiced, even though it induced the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Re Gleespin’s Will*, 26 N. J. Eq. 523 * * *. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence * * *.”

The court then went on to show—

“That the relation between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the

others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one and influence resulting therefrom, was not only natural, but just and reasonable and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress or something of that nature must appear; otherwise that disposition of property which occurs with the natural inclinations of the human heart must be sustained. So that if this case turns simply upon the question of undue influence, compelling a voluntary conveyance, it would be difficult to find enough in the testimony to overthrow this deed."

It may be fairly said that the dictum of *Moran v. Sullivan*, 12 App. D. C. 137, is overruled by *Madre v. Gaskins*. Other cases urged by the plaintiffs in the court below arising in this District involved wills, but the rule governing there does not apply to the execution of a deed, possibly because a testator, who is not stripping himself of his property during his lifetime, may for that reason be more readily susceptible to influence than the maker of a deed, who must realize that the conveyance upon its execution becomes irrevocable.

The lower court had no basis upon which to find that the deed had been procured by undue influence, or to set it aside on this ground.

C. There Was Consideration for the Execution of the Deed.

Although there can be no question but that a deed will stand as a gift in the absence of consideration, the plaintiffs showed in their case that there was consideration for the execution of the deed. This constitutes a further reason for upholding it. The witness Chacchia, on cross-examination, testified as follows:

"She (the decedent) then explained that she was going to live there and that John was going to take care of her the rest of her life, for which she was going to turn over this property to him. I also recall that I asked her if she wanted a written agreement to the effect that Mr. Kashouty would take care of her the rest of her life. I told her that was customary. She would not hear of anything like that; she said that she trusted him and if she did not trust him she would not be there." (Parenthetical phrase added; Appellant's App. 21).

This was the only testimony on this aspect of the case. She did live with the defendant until her death and he gave her kind and attentive care.

D. Only An Executor or Administrator Could Properly Prosecute this Action.

Title 24, Section 31 of the Code of the District of Columbia (*supra*, p. 11) has been strictly construed. Only an executor or an administrator comes within the term "legal representative." In *Fleming v. Capital Traction Company*, 40 App. D. C. 489, the Court said at page 491 (interpreting Title 21, Section 1):

"The words 'personal representative', as used in this statute, have been held to refer either to the executor or administrator, and hence, as the right of action is statutory, no person other than those upon whom authority to bring the action is expressly conferred may maintain it. *Ferguson v. Washington & G. R. Co.*, 6 App. D. C. 525."

Also see *Metzger v. O'Donoghue*, 53 App. D. C. 107, 288 Fed. 461.

Thus, the question involved is whether or not the heirs are here suing on (1) a right of action in favor of the decedent, or (2) a different right of action arising as to them. If the same cause of action, the statute is clear to the effect that the executor or administrator must bring the suit.

The right of action here involved is clearly the same as held by the decedent. In *Terry v. Sharon*, 131 U. S. 40, 33

L. ed. 94, 9 Sup. Ct. Rep. 705, a plaintiff had brought suit to have a declaration of marriage declared null and void. After his death, a decree was entered in his favor. A bill of revivor was brought by the plaintiff's duly qualified executor several years later. A demurrer was overruled. The Supreme Court, in affirming this decision, said, at p. 47:

"This order does no more than place before the court in connection with the case a person occupying the position of plaintiff in that suit in the place of the deceased complainant, with such authority to avail himself of all the rights determined in favor of Sharon by the original decree as may be essential to the protection of the estate of Sharon, or the interests of his heirs or devisees, as they may be affected by that decree. That some one should be substituted in the place of Sharon, the complainant in that suit, who should be able to obtain the fruits of that litigation for the benefit of those who may be entitled to them, is so much a matter of course that it is difficult to conceive of a reason why such a substitution, through a bill of revivor, the usual proceeding in chancery cases, should not be had."

Since revival was allowed, it necessarily follows that the cause of action survived. Thus, a cause of action to cancel a declaration of marriage (which affects property rights in the same manner as a deed) survives. Indeed, a right of action for cancellation of a deed because of fraud survives. *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958. It necessarily follows that the same right of action continues, but no new right of action springs up.

In ejectment the cases are clear to the effect that if an adverse possessor continues as such for the statutory period, he acquires title, regardless of whether the owner had died in the interim. *Davis v. Coblens*, 12 App. D. C. 51, 174 U. S. 719, 43 L. ed. 1147, 19 Sup. Ct. Rep. 832; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142. This necessarily means that the right of action which the heir could maintain was the same right of action which the decedent had; otherwise, the period of the statute would have to begin to run anew. And in the case of ejectment, the

heir had a legal title, and his right of action to retain it—whereas in the case of setting aside a deed on the grounds of undue influence, the heir had not the legal title, but a mere right of action to secure it. It follows that this right of action in the heir to have a deed set aside in equity is even more clearly the same right of action which belonged to the decedent as in cases of ejectment.

Supposing laches to be measured by the legal statute of limitations, it would indeed be an absurdity to say that a deed could be avoided on the ground of undue influence fifty years after its execution merely because the grantor and a number of successive heirs had died before the statutory period had run completely as to any one of them. Consequently, no new cause of action arises in favor of the heirs.

Section 31, Title 24, is unequivocal in terms and requires that the personal representative proceed with the action on behalf of those who have the substantive right to the property or its proceeds. Therefore, the present plaintiffs had no standing to bring this claim.

E. The District Court Had No Jurisdiction to Entertain the Suit.

1. The determination of the validity or invalidity of the will is a condition precedent to the bringing of this suit.

The original complaint was brought in the names of the beneficiaries and executor of the will of the decedent as parties plaintiff. The amended complaint dropped the two original plaintiffs who were not heirs-at-law of the decedent, and the remaining plaintiffs alleged that it was their belief that the will was invalid because the decedent was of unsound mind at the time of its execution. The question of the validity or invalidity of the will has never been determined, nor has any attempt ever been made to probate the will. There is a presumption that the will is valid, even though it has never been submitted to the Probate Court. *Leach v. Burr* (1903), 188 U. S. 510, 47 L. ed. 567, 23 Sup. Ct. Rep. 393; *Brosnan v. Brosnan* (1923), 263 U. S. 345, 68

L. ed. 332, 44 Sup. Ct. Rep. 117. If it is valid, this suit could have been properly brought only by the executor.

The assumption of jurisdiction by the District Court may readily give rise to such a situation as is found in the case of *Atwood v. Rhode Island Hospital*, 34 F. (2d) 18, C. C. A. 1st (1929). In the original case, 275 Fed. 513, which had come into the Federal Court because of diverse citizenship, the Circuit Court of Appeals held that a portion of the will involved was inoperative and void. It decided that certain real estate, about which the litigation turned, constituted a resulting or constructive trust for the benefit of the heirs at law of the decedent, concluding that the testator had died intestate as to this residue. Subsequent to this action in the Federal Court the State Court authorized the probate of the will, holding the same provisions to be operative and valid, this being affirmed by the Supreme Court of Rhode Island. After the State Court had taken this action, the heirs, who had been successful in the first suit in the Federal Court, brought a supplemental bill in the Federal Court in order that the proceedings there might govern. The relief sought in the second bill was denied by the Circuit Court of Appeals, 34 F. (2d) 18 (C. C. A. 1st, 1929), that Court holding that the determination of the Probate Court as to the validity and operative effect of the will must govern. The Court found itself in the awkward position of being obliged to nullify in effect its decision in the first suit, because of its failure to recognize an absence of jurisdiction over an essential part of the original suit.

In the case under consideration the executor, devisees, or legatees may have the will probated. As it is the executor's duty to do so, it should be assumed that such an attempt will be made, especially since the trial court found the decedent to be of sound mind. The executor would then be obliged to proceed against the heirs, who in the meantime may have disposed of the property to bona fide purchasers and done away with the proceeds. Legal complications would be practically sure to follow. Equity should not decide a ques-

tion concerning which the Probate Court can upset its finding.

The only possible manner in which the defendant can protect himself against the threat of double litigation is by compelling the plaintiffs to settle this preliminary matter in the Probate Court.

In the absence of jurisdiction in the lower court to determine the validity of the will, it follows as a necessary consequence that the present claimants can establish no title or right which would authorize them to maintain this suit, it being clearly a matter of contingency as to whether the executor is the proper claimant or the heirs at law. In a recent case where a similar contingency was present the court below refused to proceed further with the action. *Cantrell v. McClelland*, Equity No. 64, 115, 67 Wash. Law. R. 141. Not only have the plaintiffs spread upon the record the existence of the will and the fact that it has been filed in the Probate Court, but they have obviously hesitated to make a direct allegation that the testatrix was mentally incompetent at the time of its execution. They evaded the point with a mere statement that it was their "belief" that at the time of the execution she was of unsound mind. The lower court has now found against them on this point, the consequence of which would indicate that no one but the executor is a proper plaintiff.

2. The question of the validity of the will could not be properly raised before the lower court.

Title 18, Section 123 of the Code of the District of Columbia (*supra*, p. 11) was substantially enacted by Act of June 8, 1898. The then existing situation appears from the debate of the bill on the House floor. Representative Jenkins from Wisconsin, reporting the bill, read a letter from Justice Hagner of the then Supreme Court of the District of Columbia, in which it was pointed out that the Supreme Court sitting as the Orphans' Court was without jurisdiction to probate wills devising real estate alone, and, as to

wills devising real estate and bequeathing personalty, the probate was operative only as to personalty. The letter further pointed out that in any controversy at law or equity having in issue the title to the realty, the will had to be established anew by the testimony of attesting witnesses. (Congressional Record, 55th Congress, 2nd Session, p. 4727). The written report filed by the Committee stated that the most pressing evil was the fact that the Probate Court might find the will good as to personalty, and the court of law might find it bad as to realty. (55th Congress, 2nd Session, H. R. 1235).

This is the situation the statute was intended to and did expressly remedy.

“* * * Plenary jurisdiction to hear and determine all questions relating to the execution and to the validity of any and all wills * * *”.

The plaintiffs tacitly concede in their amended complaint that the Court must determine the will to be invalid before proceeding to a consideration of the relief which they seek.

Ever since the case of *Broderick's Estate*, 21 Wall. 503 (1875), 22 L. ed. 599, the law has been clear that where a statute requires a will to be probated, heirs cannot have the probate set aside in another court, unless the statute specifically prescribes a method of collateral attack. Mr. Justice Bradley states:

“* * *, it is undoubtedly the general rule established both in England and this country that a court of equity will not entertain jurisdiction of a bill to set aside a will *or* the probate thereof.” (Italics ours)

Also see *Sutton v. English*, 246 U. S. 199, 205 (1918), 62 L. ed. 664, 38 Sup. Ct. Rep. 254.

No cases have been found wherein the Supreme Court was called upon to consider the question of whether or not an attack could be made in a court of equity on an unprobated will. It seems, however, that a statute granting plenary jurisdiction to a probate court to determine questions of

the validity of wills would be as much violated if another court were allowed to consider this question before probate as if another court were allowed to consider it after probate. There is the same possibility of conflict in decision. It may be noted that Mr. Justice Bradley's quotation above is broad enough to cover both situations.

In *Gracie v. American Security & Trust Co.*, 51 App. D. C. 141, 277 Fed. 543 (1921), an administrator and one claiming under a will both claimed certain property in the custody of a bank. The bank interpleaded and the court of equity dismissed the cross-bill of the supposed legatee and entered a supplemental order for the transfer of this aspect of the case to the Probate Court. The Court said on page 143:

"It thus appears that our probate court has been clothed with full and complete jurisdiction to take proof of wills of either personal or real estate, and to admit the same to probate and record. That it was the intent of Congress to make this jurisdiction exclusive is too plain to admit of serious doubt. When we come to consider that this probate court is a branch of the Supreme Court, and possesses all necessary power in the premises, it becomes apparent that there is every reason for assuming that Congress, having established this special court for this special purpose, intended its jurisdiction to be exclusive."

In *Beyer v. Le Fevre*, 17 App. D. C. 238 (1900) it was held that a will having been probated could be set aside by the heirs at law in a proceeding in equity *where it had been probated before 1898*. In its opinion, the Court stated, on p. 248:

"If this case had originated under a will made since the passage of the act of Congress just referred to, the devisee could only claim by virtue of the probate of the will had under that act. The Supreme Court of the District, holding special sessions for orphans' court business, has been given full and plenary jurisdiction over the subject of admitting or refusing probate of wills affecting real estate, just as in the case of wills and testaments affecting personal estate; and the judg-

ment of that court can not be called in question in any collateral proceeding. It is given by the statute an exclusive jurisdiction over the matter of probate, subject, of course, to review on appeal. Act of Congress, sections 2, 3, 6 and 7; *Case of Broderick's Will*, 21 Wall. 503; *Allen v. McPherson*, 1 Ho. L. Cas. 191."

And in *Bradley v. Bradley*, 117 Md. 515, the Court said:

"We think it clear * * * that a court of equity has no power to determine whether a will shall be admitted to probate or to revoke an order of the Orphans' Court admitting a will to probate."

F. A Physician May Testify as to Matters Unrelated to His Professional Capacity to Decedent.

The deposition of Dr. E. Herndon Hudson was offered in evidence by the defendants, and excluded by the court. (Appellant's App. 63-67). He testified that he was called in while decedent was in a sanitarium with which he was connected in a professional capacity. He spoke Arabic, and acted as translator. He testified that she was a "typical, stubborn, garrulous, old Lebanese woman". This is the observation of a layman, not of a professional man. His testimony was offered primarily to show the observations he made as to the decedent, entirely apart from her physical or mental health.

It is conceded that the rule in the District of Columbia does not permit a physician to testify concerning confidential information acquired while attending a patient in his professional capacity, without consent of the person afflicted, or his legal representative. Code of the District of Columbia, Title 9, Sec. 20; *Hutchins v. Hutchins*, 48 App. D. C. 495.

But the testimony of Dr. Hudson, with the possible exception of a very small portion, was admissible entirely aside from any question of presumed consent. The facts to which Dr. Hudson testified, and which were important to assist in establishing that the decedent was not unduly susceptible to the influence of anyone, were not based upon the rela-

tionship of physician and patient, but were based upon the relationship of translator and speaker. The bulk of this testimony cannot be considered confidential in any respect. In *Stafford v. American Security & Trust Co.*, 60 App. D. C. 380, 55 F. (2d) 542 the testimony of a physician was held properly excluded because:

“No offer of proof having been made, it must be assumed that the knowledge of the witness was based upon the relationship of physician and patient.”

The ruling in that case was merely that the physician could not testify to anything he learned from the testatrix “while he was her physician and saw as her physician”.

In Dr. Hudson’s deposition, it appears that his observations were based not on what she said, but on the manner in which she said it and conducted herself generally. (Appellant’s App. 63-67).

CONCLUSION.

On the whole case there was not the slightest evidence of undue influence nor were there any circumstances which in the closest scrutiny would bring about an inference that an improper or evil influence or coercion had been exercised upon the decedent. On the contrary the conveyance was motivated by an appreciation of kindness and solicitude. From a procedural point of view the action was improperly brought and prosecuted in light of the statutes of this District requiring it to be maintained by the personal representative of the decedent subsequent to a determination as to the validity of the will. It is submitted that the decision of the District Court was in error and should be reversed.

Respectfully,

BYNUM E. HINTON,
ALEXANDER M. HERON,
WILLIAM L. OWEN,
Attorneys for Appellant.

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1941.

No. 7856.

JOHN B. KASHOUTY, *Appellant*,

v.

ANTHONY DEEP, JR., ET AL., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

I.

PLEADINGS AND OTHER PAPERS DESIGNATED
BY APPELLANT.

1 In the District Court of the United States
 For the District of Columbia
 Civil Action No. 1092.

ANTHONY DEEP, JR., WILLIAM DEEP, By their mother and next friend, Mrs. Anthony Deep, 253 80th Street, Brooklyn, New York; ANNIE GABRIEL, San Antonio, Texas; ST. GEORGE SYRIAN ORTHODOX CHURCH SOCIETY OF WASHINGTON, D. C., Washington, D. C.; JOSEPH S. SADO, 1818 C Street, S. E., Washington, D. C., *Plaintiffs*,

v.

JOHN B. KASHOUTY, 372 Exchange Street, Geneva, New York, GEORGE DEEP, Lynchburg, Virginia, *Defendants*.

Complaint to Establish Trust on Lot 194 Square 4202.

1. Plaintiffs Anthony Deep, Jr. and William Deep are grandchildren of Fannie Deep and are named as beneficiaries in her will hereinafter mentioned. Their father, Anthony Deep, who was a child of the aforementioned Fannie Deep, predeceased his mother. This suit is brought on behalf of the said two plaintiffs who are infants under the age of 21 years by their mother and next friend, Mrs. Anthony Deep. Plaintiff Annie Gabriel is a daughter of Fannie Deep and is also a beneficiary under the will aforesaid. Plaintiff St. George Syrian Orthodox Church Society of Washington, D. C. is an incorporated religious
 2 organization and is also a beneficiary named in said will. Plaintiff Joseph S. Sado is named as Executor in said will.

2. Defendant George Deep is a son of said Fannie Deep and together with Annie Gabriel and the infants Anthony Deep, Jr. and William Deep are the only heirs-at-law and next-of-kin of said Fannie Deep. John B. Kashouty is the present record owner of lot 194 square 4202, Washington, D. C.

3. Fannie Deep departed this life December 7, 1938 at Geneva, New York, where she was temporarily staying with

defendant John B. Kashouty and his family. At the time of her death said Fannie Deep was more than ninety years old and was unable to read or write. She had been with defendant John B. Kashouty since July, 1938 and just prior to her death she underwent a very serious operation, the news of which was kept from her daughter and grandchildren. On September 17, 1938 a deed conveying lot 194 in square 4202 from said Fannie Deep to John B. Kashouty was signed by said Fannie Deep by her mark, reciting a consideration of ten dollars and mutual love and affection and other good and valuable considerations. Plaintiffs allege that the aforementioned deed was obtained from the said Fannie Deep without consideration and by fraud and undue influence.

4. On to-wit September 29, 1938 while Fannie Deep was living at the home of defendant John B. Kashouty, said defendant procured the transfer of the sum of \$1101.58 from said Fannie Deep to the names of Fannie Deep and John B. Kashouty, payable to either or the survivor, and said fund was so deposited to their joint names in the National Bank of Geneva, New York. This transfer was made without consideration and was the result of fraud and undue influence practiced upon Fannie Deep by defendant John B. Kashouty.

5. Prior to Fannie Deep's going to Geneva, New York to stay with John B. Kashouty in July, said Fannie Deep had made her home in the District of Columbia for many years and her trip to Kashouty's home was to have a visit and was never at any time considered by Fannie Deep to be a change in her residence. On June 2, 1938 said Fannie Deep made, published and declared her last will and testament, which said will has been filed in the Office of the Register of Wills in the District of Columbia. A copy of said will is hereto annexed and prayed to be read as a part hereof. Due to the transfer of both the real estate and the personal property from Fannie Deep to John B. Kashouty as aforesaid there is no property to be administered by the Executor named in the aforesaid will.

Wherefore, plaintiffs pray:

1. That defendant John B. Kashouty be decreed to hold the real estate known as lot 194 in square 4202, Washington, D. C. as a Trustee for the benefit of the persons named in the last will and testament of Fannie Deep, deceased, or if said last will and testament be refused admission to probate, for the benefit of the heirs-at-law of said Fannie Deep.

2. That a Trustee be appointed to convey the aforesaid property to the Executor named in said will or if said will be not admitted to probate to the heirs-at-law of said Fannie Deep.

3. For such other and further relief as to the Court may seem necessary.

WALTER M. BASTIAN,
ALBERT F. ADAMS,
National Press Building,
JOHN S. SADO,
Attorneys for plaintiffs.

4

Last Will and Testament

I, Fannie Deep, of the city of Washington, District of Columbia, being of sound mind and memory, do hereby make, publish and declare this to be my last Will and Testament, in the manner and form following, and hereby revoke any will or wills heretofore made by me. I further declare that this will, kept in the custody of my executor hereinafter named, it is the only authentic will to which I affixed my mark.

First: I direct that all my just debts and funeral expenses be paid.

Second: I direct my executor to sell all my real property, and the proceeds thereof, together with all my other personal property wherever situated and of whatsoever character, be then distributed as follows:

(a) To my grandchildren, Anthony Deep, Jr. and William Deep, the sum of Five Hundred Dollars (\$500.00) each; this sum to be deposited by my executor as trustee for the two children until they reach the age of twenty-one. Provided,

however, that said trustee may in his absolute discretion release a portion or all of said trust fund, at any time, if in his opinion he deems it necessary for the maintenance and/or education of said children.

(b) To the Saint George Syrian Orthodox Church Society of Washington, D. C., the sum of Fifty Dollars (\$50.00).

(c) To my daughter, Annie Gabriel of Texas, the rest and residue of my estate.

Third: In the event that any of the aforementioned beneficiaries should predecease me, his or her share shall go or be divided among the survivors of the above named beneficiaries in accordance with the above stipulations.

5 Fourth: I do hereby make, constitute and appoint Joseph S. Sado of Washington, D. C., to be my executor, without bond, of this my last Will and Testament.

Fifth: While I am aware of the number and the existence of my other descendants and next of kin, it is my intention that no one of them be the beneficiary of my bounty, except those above named.

In witness whereof, I, Fannie Deep, the Testatrix above named, have subscribed my mark and authorized affixing of my name and seal this second day of June in the Year of our Lord, One Thousand Nine Hundred and Thirty-eight.

Her
FANNIE X DEEP (Seal)
Mark

Signed, sealed, published and declared by the above Testatrix, Fannie Deep, as and for her Last Will and Testament In the presence of us, who have hereunto subscribed our names at her request as witnesses thereto, in the presence of said Testatrix, Fannie Deep, and of each other.

CHAS. KOGOK (Witness)
ANTONA KOGOK (Witness)

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9 In the District Court of the United States
 For the District of Columbia
 Civil Action No. 1092.

ANTHONY DEEP, JR., *et al*, Plaintiffs,

v.

JOHN B. KASHOUTY, *et al*, Defendant.

*Amended Complaint to Establish Trust on Lot 194 Square
4202*

Leave of Court having been first had and obtained plaintiffs show:

1. Since the filing of the original complaint information has been received by plaintiffs making it necessary and proper to drop as parties plaintiff Joseph S. Sado and St. George Syrian Orthodox Church Society of Washington, D. C.

2. Plaintiffs Anthony Deep, Jr. and William Deep are heirs-at-law of Fannie Deep, deceased, their father, Anthony Deep, who was a son of the aforementioned Fannie Deep, predeceasing his mother. This suit is brought on behalf of the said two plaintiffs, who are infants under the age of twenty-one years, by their mother and next friend, Mrs. Anthony Deep. Plaintiff Annie Gabriel is an heir-at-law and daughter of Fannie Deep.

3. Defendant George Deep is an heir-at-law and son of Fannie Deep. Defendant John B. Kashouty is the present record owner of lot 194 square 4202 in Washington, D. C.

4. Fannie Deep departed this life December 7, 1938 at Geneva, New York, where she was temporarily staying with defendant John B. Kashouty and his family. Prior to going to Geneva, New York, said Fannie Deep had for many
10 years maintained her home and residence in Washington, D. C. At the time of her death said Fannie Deep was more than ninety years old and was unable to read or write. She had been with defendant John B. Kashouty since July, 1938. On September 17, 1938 a deed conveying

lot 194 square 4202 from said Fannie Deep to John B. Kashouty was signed by said Fannie Deep by her mark, reciting a consideration of ten dollars and mutual love and affection and other good and valuable considerations. Plaintiffs allege that at the time of the purported execution of the aforementioned deed Fannie Deep was of unsound mind and incapable of executing a valid deed, and further that there was no consideration for her executing said deed, and that undue influence was used upon her by defendant John B. Kashouty and others acting in his behalf. Plaintiffs state that on June 2, 1938 said Fannie Deep made, published and declared a paper as and for her last will and testament, which said paper writing has been filed in the office of the Register of Wills for the District of Columbia. Plaintiffs state that it is their belief that at the time of the execution of the said paper writing said Fannie Deep was of unsound mind and said paper writing therefore does not constitute a valid will.

5. Plaintiffs Anthony Deep, Jr. William Deep and Annie Gabriel, and defendant George Deep are the only heirs-at-law of Fannie Deep and are entitled to have property known as lot 194 in square 4202 freed from the effect of the aforementioned deed, or in the alternative, have defendant Kashouty decreed to hold the title to the aforementioned real estate as Trustee for the heirs-at-law of Fannie Deep.

Wherefore, plaintiffs pray:

11 1. That defendant John B. Kashouty be decreed to hold the real estate known as lot 194 square 4202 in Washington, D. C. as a Trustee for the benefit of the heirs-at-law of Fannie Deep.

2. That a Trustee be appointed to convey the aforesaid property to the heirs-at-law of said Fannie Deep.

3. Or in the alternative that the deed from Fannie Deep to John B. Kashouty above referred to be declared freed and of no effect.

4. For such other and further relief as to the Court may seem just and proper.

WALTER M. BASTIAN
ALBERT F. ADAMS
JOSEPH S. SADO
Attorneys for plaintiffs
National Press Bldg.

Service by mailing copy to attorneys for defendants
3/10/39

* * * * *

12 In the District Court of the United States
For the District of Columbia

Civil Action No. 1092.

ANTHONY DEEP, JR., *et al*, *Plaintiffs*,

v.

JOHN B. KASHOUTY, *et al*, *Defendants*.

Motion Under Rule 12

Comes now the defendant John B. Kashouty and moves the Court:

1. To dismiss the complaint because of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

2. To require the plaintiffs to state with more definiteness and particularity the undue influence alleged to have been practiced upon the decedent.

HINTON & HERON
By ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.
Attorneys for John B. Kashouty

The points to be argued in support of the foregoing motion are:

1. That the establishment of the invalidity of the will is a necessary element of plaintiff's case, and cannot be effected by this Court.

2. That under Section 235 of the Code, only an executor or administrator can properly prosecute this action.

3. That allegations of undue influence are similar
13 to, and should be pleaded with the same particularity as allegations of fraud.

4. And other matters appearing on the face of the complaint.

* * * * *

Messrs. Walter M. Bastian,
Albert F. Adams,
Joseph S. Sado,
Attorneys for Plaintiff,
National Press Building,
Washington, D. C.
Gentlemen:

Please take notice that the Points and Authorities to be submitted in support of this Motion and the authorities intended to be used are attached hereto. The rules of the above entitled Court require that if you oppose the granting of the above Motion you shall, within five days from the date of service of a copy of this paper upon you, or such further time as the Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of the said Court, a statement of the Points and Authorities upon which you rely.

HINTON & HERON
By ALEXANDER M. HERON,
Munsey Building,
Washington, D. C.
Attorneys for John B. Kashouty

Copy of the foregoing Motion, together with attached Points and Authorities received this 17th day of March, 1939.

WALTER M. BASTIAN,
Attorney for Plaintiff.

14 In the District Court of the United States
For the District of Columbia

Civil Action No. 1092.

ANTHONY DEEP, JR., *et al*, Plaintiffs,

v.

JOHN B. KASHOUTY, *et al*, Defendants.

Order Overruling Motion of Defendant Under Rule 12

Upon consideration of the motion of defendant John B. Kashouty under rule 12 to dismiss the amended complaint filed herein and to require the plaintiffs to state with more definiteness and particularity and the argument of counsel thereon, it is, by the Court, this 10th day of May, 1939,

Ordered, That the said motion be and the same is hereby overruled with leave to defendant to file his answer within ten days.

JOSEPH W. COX

Justice

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16 In the District Court of the United States
For the District of Columbia

Civil Action No. 1092.

ANTHONY DEEP, JR., *et al*, Plaintiffs,

v.

JOHN B. KASHOUTY, *et al*, Defendants.

Answer of John B. Kashouty to Amended Complaint

The defendant John B. Kashouty for an answer to the Amended Complaint herein says that:

1. He does not know what additional information came to the plaintiffs between the filing of the original Complaint and the Amended Complaint.

2. He admits the allegations of paragraph 2 of the Complaint.

3. He admits the allegations of paragraph 3 of the Complaint.

4. He admits that Fannie Deep departed this life on December 7, 1938, at Geneva, New York, but denies that she was temporarily staying there at that time. On the contrary he says that she had taken up a permanent residence with him and his family at Geneva, New York, and had become a resident of and domiciled in the State of New York. He denies that she was more than 90 years old, but says that at the time of her death she was about 75 years old. He denies that the deed of September 17, 1938, was executed without consideration, but says that in consideration therefor he agreed to and did provide a home for her and maintained her for the remainder of her life. He further says that the agreement so made and the conveyance of the said property in consideration therefor, were at the instance and request of the said Fannie Deep,

17 and in order to insure provision for her maintenance during the remaining portion of her life. He denies that the said Fannie Deep was of unsound mind and incapable of executing a valid deed at any time, but says that she was of sound mind and fully capable of executing said deed. He denies that undue influence was used upon her by him or others acting in his behalf, but on the contrary says he caused her to obtain independent and disinterested advice in connection therewith. He admits that on June 2, 1938, the said Fannie Deep made, declared and published her last will and testament, which same is now filed in the office of the Register of Wills for the District of Columbia, but he denies that the said Fannie Deep was of unsound mind at the time of executing said will, and denies that said will is invalid.

5. He denies that the said Anthony Deep, Jr., William Deep, Annie Gabriel and George Deep are entitled to Lot 194 in Square 4202, and denies that they have any interest in or right and title to the same.

HINTON & HERON

By ALEXANDER H. HERON,

Munsey Building,

Washington, D. C.

Attorney for Defendant John B. Kashouty

CERTIFICATE OF SERVICE

I, Alexander M. Heron, one of counsel for the defendant John B. Kashouty, do hereby certify that copies of the foregoing pleading were served upon Messrs. Walter M. Bastian and Albert F. Adams, Attorneys for Plaintiffs, and Eugene R. West, Esquire, Attorney for the Defendant Deep, by mailing the same this 20th day of June, 1939.

ALEXANDER M. HERON.

* * * * *

(Opinion of the Court)

213

Civil Action No. 1092.

DEEP ET AL

v.

KASHOUTY ET AL.

The decedent, Fanny Deep, in July 1938, came to live with her nephew, the defendant Kashouty. She was then evidently over eighty years of age and in ill health and an enfeebled condition. In September of the same year she executed a deed conveying to Kashouty the property in question in this case, and in December of the same year she died. She spoke Arabic but had a limited knowledge of English. The deed was prepared by Kashouty's lawyer, and it is testified that he explained it to her in English. However it is shown that a few days before her death she spoke of the transaction to a clergyman and stated that she wished Kashouty to have the property. But living with Kashouty as she had been doing until she went to the hospital, if under his influence before, I think that this influence continued to the time of her death. In June 1938 a month

214 before she went to live with her nephew she executed a will leaving the bulk of her property to her grandchildren.

In view of all the circumstances I am of the opinion that although she was not of unsound mind at the time of executing the deed in question, she was feeble in body, making her all the more susceptible to the influence of one whom

she trusted, largely ignorant of the English language, signing her name by a mark, the execution of the deed was not her free and voluntary act but was procured by undue influence.

The plaintiff has moved to amend the complaint to seek the recovery of some cash deposited in the joint names of the decedent and Kashouty. This motion is denied for two reasons. 1st—The plaintiffs in their opposition to a motion to dismiss the original complaint stated that the allegation in the original complaint as to this fraud, was not made with any attempt to recover it, and 2nd—Any action to recover this fund would have to be brought by the personal representative of the decedent. *Cunningham vs. Rogers*, 257 U. S. 466.

215 As to the necessity of making the executor of the will of Fanny Deep a party to this suit, that question has apparently been passed on by the late Mr. Justice Cox. In any event any recovery of the title to the land by the plaintiffs will be subject to the provisions of any will that may be probated.

I have excluded the testimony of the defendant Kashouty, but if admitted, it would not change my conclusions.

BAILEY,
J.

216 *Findings of Fact and Conclusions of Law*

This cause coming on to be heard by the Court, without a jury, and upon consideration thereof, from the evidence adduced, the Court this day of January, A. D., 1941, does hereby make the following:

Findings of Fact

1. Decedent, Fannie Deep, was the owner of Lot 194 Square 4202 of the District of Columbia. She purchased this property in January, 1938, with her own funds. In June of 1938, a month before she went to live with defendant Kashouty, she executed a will leaving the bulk of her

property to her daughter and her grandchildren, who are among the plaintiffs in this suit.

2. In July, 1938, decedent went from Washington, D. C., to live with her nephew, the defendant Kashouty, in Geneva, New York, and continued to live with him until she went to the hospital a few days before her death, which occurred on December 7, 1938. She was then evidently over eighty years of age, in ill health and an enfeebled condition. She spoke Arabic but had a limited knowledge of English. Although she was not of unsound mind at the time of executing the deed in question, her feebleness of body made her all the more susceptible to influence of her nephew, the defendant, John B. Kashouty, whom she trusted.

217 3. The deed transferring the above-mentioned property from her to Kashouty was prepared by Kashouty's lawyer. Said deed was executed on September 17, 1939 and recorded on October 24, 1938. No monetary consideration passed from Kashouty.

4. The execution of the deed was not her free and voluntary act, but was procured by undue influence practiced upon her by the defendant, John B. Kashouty.

Conclusions of Law

1. The deed conveying Lot 194 Square 4202 of the District of Columbia from Fannie Deep to John B. Kashouty is invalid and void and the plaintiffs are entitled to a decree declaring said deed void and of no effect.

Judgment will be entered accordingly.

JENNINGS BAILEY,
Justice.

Defendant Kashouty notes an objection to the foregoing findings of fact and conclusions of law.

Judgment Declaring Deed Invalid

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard, and the Court having made its findings of fact and conclusions of law, it is hereby, by the Court this 27th day of January, 1941,

ADJUDGED, ORDERED and DECREED, That the deed from Fannie Deep to John B. Kashouty, dated September 17, 1938, recorded October 24, 1938, conveying Lot 194 in Square 4202 in the District of Columbia be and the same is hereby declared invalid, void and of no effect.

JENNINGS BAILEY

Justice

Defendant Kashouty notes an objection to the foregoing order.

II.

**EXCERPTS FROM TESTIMONY AND PROCEEDINGS
DESIGNATED BY APPELLANT.**

Evidence at Trial Introduced on Behalf of Plaintiffs.

* * * * *

**Testimony of Sister Bellina (Julia Hautzinger)
(Direct Examination).**

* * * * *

78 Q. Did she fit in with the routine of your Home?

A. Well, not with the guests so well. Of course, we make them fit in with the routine.

Q. Did you have any difficulty having her fit in with the routine? A. Well, she was very determined and obstinate at times.

* * * * *

Testimony of Appellee Joseph Sado (Cross-examination).

* * * * *

88 Q. Did she have a determination of character about things that she wanted to do? A. Well, she was rather obstinate about things and her general affairs.

Q. She was? A. Yes.

* * * * *

Testimony of Appellee Mike Deep (Direct Examination).

* * * * *

90 Q. Did there come a time when Fannie Deep and you and your family resided together? A. Yes, sir.

Q. When was that? A. That was in the year 1938, and the month of—right after Dr. Deep's death, two days after Dr. Deep's death.

Q. Two days after Dr. Deep's death A. Yes. That was in 1937.

Q. In 1937? A. Yes.

Q. Where were you living at that time? A. 1307 N Street, Northwest.

Q. How long did you live there with Mrs. Fannie Deep? A. She stayed there about two weeks with us.

Q. Two weeks? A. Yes.

Q. Did you move to another place with her or did she leave you? A. We moved to the house we bought with her.

Q. Will you tell the Court the circumstances of
91 buying that house? A. Well, as she wanted me to buy a house and we live together—and went to the bank and got the money, and went to the real estate and bought the home. And we moved in the house; and she would not stay there over two weeks. She was so irritable, and she would not sleep at nights and would not eat nothing, and almost killed one of the babies.

Q. When you were going to buy the house, who was to put up the money? A. She put up the money.

Q. How was the title to the house? A. The title was supposed to be in her name or my name; in case of her death, I got it; and in case of my death, she gets it.

* * * * *

Testimony of Appellee Mike Deep (Cross-examination).

95 Q. Do I understand that she came to live with you two days after Dr. Deep's death A. Yes, sir.

* * * * *

96 Q. How many rooms did you have? A. We had three rooms.

97 Q. You are married and have two children? A. Three now.

Q. Two at that time? A. Yes.

Q. The five of you lived in the three rooms? A. Yes.

Q. How old were those children? A. Now?

Q. At that time. A. Oh, between two and four.

Mr. Heron. That is all.

* * * * *

Testimony of M. Maurice Chacchia (Direct Examination).

101 By Mr. Adams:

Q. Will you state your name—

The Court (interposing). Don't you know it?

Mr. Adams. His name is M. Maurice Chacchia.

The Court. How do you spell it?

Mr. Adams. Chacchia, C-h-a-c-c-h-i-a.

By the Court:

Q. Is that your name A. Yes.

By Mr. Adams:

Q. Mr. Chacchia, you are an attorney and counselor at law? A. In the State of New York; yes.

Q. You prepared this deed (indicating), did you? A. I did.

The Court. Is that the deed in question?

102 Mr. Adams. Yes, your Honor; and this deed has been admitted in pre-trial.

The Court. Very well.

By Mr. Adams:

Q. For whom did you prepare this? A. Mrs. Fannie Deep.

Q. Do you speak Arabic? A. No.

Q. You got the instruction through Mr. Kashouty, to prepare the deed? A. No, I talked with her. She could speak enough English so as to make herself understood.

Q. Who was present when you talked to her? A. The first time I was there, I was talking with her; and my secretary—at that time, who is now my wife—was also present in the room. Mr. Kashouty was in some part of the room, and

I believe Mrs. Kashouty was there some of the time, at least. She may have been there all of the time.

Q. You have represented Mr. Kashouty, have you? A. Well, I have done work for him; yes.

Q. How long have you known Mr. Kashouty? A. Oh, I would say about 20 years, and maybe more.

Q. When did you first meet Fannie Deep? A. I believe it was in September of 1938.

Q. September of 1938? A. Yes.

Q. This deed is dated the 17th day of September. Was it in that vicinity? A. Yes—about that same day, I would say.

103 Q. Did Mr. Kashouty talk with you with reference to this transfer of property, prior to the time you talked with Mrs. Deep? A. My recollection is that about the middle or somewhere just before the 20th of August I had received a phone call from Mr. Kashouty, that his aunt wanted some information or wanted to have me do some work. I was away from August 20 until September 13; and shortly after the 13th—I would judge somewhere around the 17th, there—I received another phone call, that she wanted to see me that night. This was an evening, I believe.

And I went up there that evening, with my wife—where I was given certain information by her. And she also turned over to me a deed which she had, from which I obtained the description that is in that deed.

Q. Was Mr. Kashouty present during those times? A. Yes, that is the occasion I mentioned—this first time.

Q. Yes. Mrs. Deep was a very elderly lady? A. Pardon me?

Q. Mrs. Deep was a very elderly lady? A. I would say she was elderly.

Mr. Adams. That is all.

Testimony of M. Maurice Chacchia (Cross-examination).

By Mr. Heron:

Q. What was done on this occasion when you visited her and she gave you the deed? Was this present deed drawn at that time? A. Well, we had to leave that home,
104 and went across the street—about half a block, I should judge—to my office, where this deed was prepared.

My recollection is that we returned after it was prepared, at which time I read it to her and had her affix her mark to the deed.

It is also my recollection that the Syrian priest was supposed to be there—Father Massabini; but he was not there that evening, and I don't know whether it was the following day or a day or two thereafter, or more—I cannot tell you—that Father Massabini was available; and I was called back, and I again read the deed to her and explained it as I went along; and then every once in a while she and Father Massabini would carry on a little conversation in Syrian.

And then after we were through with that process, she acknowledged—I talked to her in what English I thought she could understand—if that was her mark and if that was the deed that she wanted to make.

And she said, "Yes."

And Father Massabini affixed his signature, and my secretary—at that time—also affixed her signature.

Now, whether I took her acknowledgment at that time or on the first occasion, I don't know.

Q. On the first occasion, do I understand that she affixed her mark? A. It is my recollection that she affixed her mark on the first occasion and that that mark was witnessed by my wife on that occasion.

Q. By "that occasion" I mean the time you came
105 back, after preparing the instrument. A. That is the second time I saw her—yes—after the instrument had been prepared.

Q. Was she physically aided in fixing the acknowledgment, do you recall? Or do you recall whether she was aided in fixing it? A. It is my recollection that she fixed it herself. I could tell if I looked at it.

(The document referred to was shown to the witness.)

The Witness. Yes, I believe that was put on there by herself.

By Mr. Heron:

Q. What was her physical appearance when you saw her?

A. She had on a dark-colored dress; I am inclined to think it was black. It looked like a warm dress. She was seated in a chair at the bay window, and she appeared to be a woman somewhere in her 70's—middle or late 70's. She had gray hair. It was not entirely gray, but it was predominantly gray.

She impressed me as being a woman not too tall, maybe a little below medium height. Of course she was sitting down, as I recollect her. She may have stood, but I don't remember seeing her do that; rather dark complexioned; she looked wrinkled to some extent—a typical woman of about that age.

Q. Was there any discussion as to the character of the instrument which was being drawn—between you and her?

A. Yes.

Q. What was that? A. When I first saw her, she told me that after her son, Dr. Anthony Deep had died, that no one else would be good to her. She spoke very affectionately of Anthony Deep for a while, and then told
106 me that now she was living with John; and she says, "John now is my son; he is like my son. I live here with John, and I want him to have this house."

She had told us about the house. I do not remember the details. She also mentioned, either on that first or second occasion, the money in the bank.

And I asked her if she wanted to make a will or a deed. She told me that she had made a will and that it was in Washington.

And I said, "Well, if you want to make a will, that is one thing. If you want to make a deed, that is another. Now, just what is your arrangement?"

She then explained that she was going to live there and that John was going to take care of her the rest of her life, for which she was going to turn over this property now.

I also recall that I asked her if she wanted a written agreement to the effect that Mr. Kashouty would take care of her the rest of her life. I told her that was customary.

She would not hear of anything like that. She said that she trusted him and that if she did not trust him she would not be there.

Q. Did either Mr. or Mrs. Kashouty take any part in those conversations at that time? A. My best recollection is that Mr. Kashouty sat in a chair to my rear and to my left. I was sitting more or less at right angles to her, facing the bay window; and she was sitting sideways in the bay window.

Q. What, if any, indication did she give as to her
107 mental condition when you talked to her? A. She impressed me as being intelligent. She understood what her ability to comprehend the language would permit her to understand.

Being accustomed to speaking to people of her race as well as of the Italian race, I was careful to use simple terms which I thought she would understand; and she appeared to understand what I said. There were some times when she could only express her understanding by saying "Yes" or "No"; but she could say "Nephew" and "My son"; she mentioned "Doctor".

There were several other words that she used—from which I was able to appreciate that she understood what she was doing and what she was talking about, particularly when she mentioned about a will that she had made here in Washington.

Q. Did she tell you anything about what the status of the property was, as far as its occupancy or want of occupancy, or any other details of it? A. Well, I have some faint rec-

ollection of some complaint that she had regarding this Washington property—that she had been displeased with something that had been done with it. But I was not able to ascertain from her just what it was. It was to the effect that someone had tried to take advantage of her.

Q. You said that you explained to her just what the deed meant. Just how did you go about explaining it to her?

A. I explained that a deed meant a present conveyance, whereas a will would not convey until death, and that a will was always revocable until death.

By the way, that brings something else to my mind: After the deed was drawn, she later made arrangements to
108 have some money transferred from Washington to Geneva, and she then asked me what she should do about the will in Washington and whether she should make another will or whether she should recall it.

I said, "You do not have to do anything about that unless you have some other property." I said, "Other than this money in the bank and this land which you are conveying by this deed, do you own any other property?"

She said, "No."

I said, "Well, if you have no other property, there is no need of making a will."

Q. Did she give any indication as to her character of mind? A. She was quite similar to a lot of other Syrian women that I have met, about her age. They are a hard-working, rugged type—

Mr. Adams (interposing). Your Honor, I think he should confine his remarks to this lady, instead of to the Syrian race.

The Court. Very well.

The Witness. All right.

She seemed to be very definite and set—a determined type. In fact, the first night that I was called, I had an engagement to go to the movies; but I understood that she was insistent that I should see her that evening.

Mr. Heron. That is all.

Testimony of M. Maurice Chacchia (Redirect Examination).

By Mr. Adams:

Q. Mr. Chacchia, you said you read the deed to
 109 her. Did you read it in English, to her? A. Yes, I
 read it in English; and every so far I would stop and
 ask her if she understood it or whether she wanted me to
 explain anything to her. And she indicated that she did
 understand.

That same procedure was repeated when Reverend Mas-
 sabini was there; because she wanted Father Massabini to
 be a witness to the deed. And I repeated that in his pres-
 ence.

Q. Then Mr. Kashouty did not read this to her in Arabic?
 A. He took no part in the transaction.

Q. And no one read the deed to her in Arabic? A. Rev-
 erend Massabini did on the occasion that he was present.

Q. Was that after— A. (Interposing) That was a day
 or two later.

Q. Was that after the deed had been executed by her?
 A. That was after she had executed it and witnessed her
 mark before my wife. But I don't know whether it was
 before I had taken her notarial acknowledgment to it.

110 Q. You say that you discussed the character of the
 instrument with her? Did you do that in English,
 also? A. Yes.

Q. That was not done in Arabic? No one translated what
 you said in Arabic? A. No.

Q. You do not know whether there was ever a transla-
 tion of what you said to her in Arabic, do you? A. On the
 first occasion there was no translation; but on the occasion
 when Reverend Massabini was there, there was a transla-
 tion.

Q. Of course, you do not know whether there was a trans-
 lation or not, because you do not know Arabic? A. Yes, if
 you speak Arabic in my presence I will know that Arabic
 is being spoken, because at one time I worked in Mr. Ka-

shouty's shoe store for several years; and I know when it is being spoken.

Q. But you do not know the words? A. I know some words.

Q. But you could not tell whether it was entirely an accurate translation? A. Oh, no.

Q. These conversations you had with her were entirely in English, on your part? A. That is true.

Q. You testified that there was some money that was brought up from Washington to Geneva? A. That is true.

Q. Do you know the approximate amount of that
111 money? A. Somewhere between \$1,100 and \$1,500.

I think it was around \$1,100.

Q. That was her money? A. It was transferred from an account that had been carried in her name.

Q. To whom was it transferred? A. Transferred to a joint account in her name and the name of John B. Kashouty.

Mr. Heron. I might point out that no part of the claim is made for that. This suit is restricted—

The Court. I think that may be brought out as an attendant circumstance.

The Witness. By the way, that was subsequent to the time the deed was executed. It took some time to complete that transaction.

By Mr. Adams:

Q. You say that you asked her about a written agreement? A. Yes.

Q. You said that in English? A. Yes.

Q. Did anyone translate that into Arabic, to her? A. No.

Mr. Adams. I think that is all.

Testimony of M. Maurice Chacchia (Re-cross-examination).

By Mr. Heron:

Q. Let me refer you to the subsequent time when I understand you explained it to her, in Mr. Massabini's presence:

Was that the time when he witnessed her execution of it?

A. That is the only time that he and I were present
112 at that home.

Q. Do you know how much time elapsed between the time when she did execute it with her mark and the time he witnessed it? A. No, I don't. It may have been a day or two.

Q. But, at least, it was not on the same date? A. I don't believe it was the same day.

Q. Did she put any questions to you? A. Regarding the deed?

Q. Regarding any of these transactions? A. Well, before she handed me her deed, she put some questions to me.

Q. Were they in sufficient English so that they were intelligible to you? A. I understood what she was intending by her words. I understood that she wanted to know how she could complete this transaction that she had been negotiating with Mr. Kashouty.

Evidence at Trial on Behalf of the Defendant.

Testimony of Appellant John B. Kashouty (Direct Examination).

121 Mr. Heron. This is the defendant, John B. Kashouty. His residence is in Geneva, New York.

By Mr. Heron:

Q. That is correct, is it not, Mr. Kashouty? A. It is—Geneva, New York.

Q. Were you related to Fannie Deep, the decedent in this case? A. I am; she is my aunt and my mother's sister.

Q. Just exactly how did that connection arise? A. Well, she is my mother's sister.

Q. She was your mother's sister? A. My mother's sister.

Q. How long had you known her? A. Well, I have known her since 1902, when we first came over to the United

States. We came over to Newport News, Virginia. She resided at that time at Newport News, Virginia.

Q. Did she come with you or did she come before that time? A. No, she came before that time.

Q. Did she have any children at that time? A. What?

122 Q. Did she have any children at that time? A.

She had Tony and Mike Deep; he was from her daughter's marriage—her grandson, Mike Deep.

Q. What about George Deep? A. Also she had George Deep; but he was a man. I have spoken about children.

Q. Did you live together at Newport News? A. We did.

Q. In the same house? A. In the same house.

Q. For how long a time? A. Why, we lived quite a while, but she and her son George went to the old country. George got married in the old country.

Q. And then they returned to Newport News? A. Then they came back again to Newport News.

Q. During that time did her husband live with her? A. No. Her husband came back with her son—her son George.

Q. When was that? A. I really could not say—I think either in 1906 or 1907. It was one of those years, but at least I do know it was during that time.

Q. Do you know what, if any, means of support she had during that time? A. She was working.

Q. What kind of work did she do? A. She used to peddle merchandise.

Q. What kind of merchandise? A. Oh, laces and
123 doilies and things of that sort, and towels and stuff of that sort.

Q. How would she get about, doing that? A. Go about from house to house in the city.

Q. How long did you live in her house, or, rather, how long did you all live together in the same house at that time? A. Why, as I said, we lived with her until she went back to the old country. Then we lived with my uncle George, who was living in the same city—Newport News.

Q. After she returned, did you live with her again at any time? A. After she returned?

Q. Yes. A. No, I did not. I lived with my uncle George.

Q. Did she ever live with you at any time after her return? A. No, she did not.

Q. How frequently did you see her from that time on?

A. Why, mostly every day or every other day, or whatever it happened; because we weren't living very far from each other.

Q. You were still living in Newport News at that time?

A. We lived in Newport News until 1907.

Q. After that relationship was broken up, where did you and she go? A. In 1907 we went back to the old country. My mother was not feeling very well; and I think it was Dr. Buxton at that time who suggested that if she go to the old country for more drier climate, she might be better. And we went to the old country, but I came back in 1908.

124 Q. What do you mean by "the old country"? A. Syria.

Q. What part of Syria? A. Tripoli.

Q. Was she from there? A. No, she was not; she came from a little village called Metten.

Q. Is that also Syria? A. That is also Syria.

Q. What about her ability to speak English? A. Why, she could not speak very fluently, but she could understand and she could do business.

Q. Did she have anyone with her when she went about doing business? A. Oh, no; she went all alone.

Q. Was she able to read and write? A. No.

Q. Did her husband ever live with her at any time after she came to America? A. Yes; when his son George brought him over, they lived together, here in Washington. They lived on K Street together.

Q. Did you live in Washington at that time? A. I did.

Q. Did you have occasion to see her then? A. Oh, yes. I lived with them here in Washington, myself.

Q. For how long? A. Oh, I lived here until my
125 mother came over—until my mother got well and she came back to the United States.

Q. Can you tell us approximately how long a time that was? A. I could not say exactly; I imagine about a year.

Q. Who else was in the household at that time? A. George Deep, her son, and his wife and herself and my aunt.

Q. And what about Anthony Deep? Was he there? A. Anthony Deep, also.

Q. And what about Fannie Deep? A. We lived all together on Seventh Street.

Q. You lived all together there? A. On Seventh Street.

Q. I think I said "Fannie". The daughter's name is Annie, isn't it? A. Oh, Annie Deep? No, Annie Deep never lived with us, all the time since we were here since 1902.

Q. Where did she live? A. Between 1902 and 1905 she lived in Philadelphia, Pennsylvania.

Q. Did you see her in that household when you were there? A. No, I never did.

Q. Do you know whether or not there had ever been any division between Annie and her mother? A. Why, there was a dispute, as I understand from my aunt, on account of marriage—to the present husband. I said "my aunt"; I meant to say Fannie Deep. There was a little dispute over the marriage to the second husband.

Q. Had that breach ever been healed? A. I really
126 could not say; I don't know.

Q. Then after this period in Washington had passed, did you live in Washington or did she? What happened then? A. I left Washington and went to Geneva, New York.

Q. About what time was that? A. That was in May, 1914.

Q. Have you lived there since? A. I have lived there ever since.

Q. Have you seen or did you see Fannie Deep between 1914 and the present time or, at least, up until Dr. Deep's death in 1937? A. Oh, yes; I used to come down here every year or every other year to see my mother.

Q. Did she live in Washington? A. Yes, my mother lived in Washington.

Q. How frequently did you make those visits? A. Oh, about every year or every other year.

Q. How long would you say when you were here? A. About a week or ten days sometimes.

Q. How frequently would you see Fannie Deep during that time? A. Why, I saw her quite frequently.

Q. In what household was she living then? A. With her son, Anthony Deep.

Q. And anyone else? A. Her daughter-in-law.

Q. What about prior to the time of their marriage in 1930: With whom did she live then? A. They used to live on Ninth Street—with her son—together.

127 Q. Was there anyone else in that household? A.

I don't remember it; there were only two of them.

Q. Do you recall the period when the son, Dr. Deep, was studying medicine? A. I do.

Q. With whom did she live at that time? A. She was living with him.

Q. Do you know who furnished the funds for Dr. Deep's studies? A. Well, she did, herself. She made a trip to Geneva, New York—mostly all the Syrians—of course, it is a small town, but we have a large Syrian community there, and practically all are Syrians from her section of the country. She made a trip around there during the time when her son was studying in college, and she raised a fund in order to keep her son going to school. So we helped her, and she lived with us in Geneva almost six months.

Q. In your household at that time? A. In my house and my mother-in-law's house, Mrs. Baroody.

Q. Did you have occasion to observe the general tenor of the household when she was living with the son, prior to his marriage? A. No, not very much.

Q. You did not, on your casual visits there? A. No. She generally used to come over to my sister's house, here in Washington.

Q. What were your relations with her during that
128 period? A. With my aunt, do you mean?

Q. Yes. A. Just normal relations—only just, “Hello” and “How are you”; and that is all—but no business relations or anything.

Q. Were you friendly? A. We have always been friendly.

Q. Did she indicate her affection for her son Anthony? A. She did.

Q. How did she indicate that? A. She was very broken-hearted.

Q. Suppose you tell me if she gave any indication during the time prior to his death. A. Well, my aunt always had a desire to see her son become a doctor, and she really worked at it very hard; and of course Anthony himself was a very nice boy; because him and I were brought up together in Newport News, and I would say he was a very nice boy. And he really would listen to his mother; and by her encouragement to him, and he had been very faithful to her, he pulled through with what she really wished him to be.

Q. Did there come any time when she explained her situation in his household? A. Do you mean after he was married or before?

Q. Well, either time. A. Well, when I used to come up to Washington, here, of course Tony—I either called him up or he called me up. But if he found out that I am in Washington, he called up the house to my sister; and he immediately came up to the house or he asked me to come up to his house.

129 Well, of course my aunt, when I would go up to his house, the minute she would have the opportunity of being free where she could speak to me direct without anybody being there, she always complained to me about the treatment that she was receiving from her daughter-in-law. And I would always try to say, “Well, you are old and she is young, and maybe your two ideas don’t work together.”

Q. Did that happen frequently? A. It happened quite frequently. Every time I came up here she always made the complaint.

Q. Do you know how Dr. Deep met his death? A. When he met his death?

Q. How? A. By committing suicide.

Q. Did you come here at that time? A. I did.

Q. What was her situation at that time? A. Well, she was very broken-hearted, and she complained that he should not have done it, and all that.

Q. Did she seem to feel that there was any responsibility anywhere in connection with it? A. Well, she thought that if he was friendly with his wife and they were living together—but she having left and went to New York—

Mr. Adams. (Interposing) Your Honor, I do not see why the matter of how and why he met his death is material here.

The Court. No, I do not, either.

Mr. Heron. My purpose is to show her frame of mind and the reasons why she did the things she did. Unless
130 her understanding of these events and the interpretation she put upon them is before you, I think that it will be difficult and perhaps impossible to appreciate the nature of her subsequent actions.

The Court. I sustain the objection.

By Mr. Heron:

Q. Did she make any statement at that time as to where she intended to live? A. Yes. She did not make that until after we came back from the funeral. At that time they were all sitting there in the large living room, and so she took me on one side, in the back of the dining room, where they had the room there, and she asked me if I would take her to Geneva.

And I said, "I don't see any reason why you should go to Geneva with me. You have a son in Lynchburg. Why don't you go live with George?"

"Well," she says, "I can't live with him; because I have tried it."

I said, "Maybe the thing has changed. Maybe you had so much confidence in Tony that you could only feel at home in Tony's house. But now Tony is gone and you have your

other son, and you should go live there." I said, "You go there and try it out, and write me how you get along. And if you don't get along, come with me. I am living in Geneva, and you can always write me a letter."

And I tried as much as I could to get her to go with her son; because her son George was there, present at the funeral.

Q. When did you see her again after that? A. I did not see her again until July, 1938.

131 Q. Did you write to her at any time between? A. I never did.

Q. Did she write to you? A. She did, but I did not answer.

Q. Did you have any other kind of communication with her, through the family or in any way? A. No, I did not.

Q. What was the occasion of your next seeing her, in July? A. She came to Geneva.

Q. Will you describe how she came? A. She came to Geneva in July.

Q. Did she come to your house, or what did she do? A. She came to the house; but I happened to be on the lake, there, in the summer, and we were not staying at home at that time.

When I got home, around 9 o'clock, she was home. She was home at my mother-in-law's house at that time; because we lived right across from one another—my mother-in-law.

Q. What did she have to say at that time? A. She said, "I understand you are moving to Canada." I said, "Who gave you that impression?"

She said, "They told me in Washington that you are moving to Canada, and I thought I would take the chance to come, anyway, to see if you are living here and to see your father-in-law"—her first cousin.

Q. Did she say anything about where she intended to stay? A. She said she wanted to stay with me.

132 I said, "Well, you could stay, as far as that is concerned; it is all right. Stay as long as you want."

"Well, no, no," she said, "I want to make my home here."

I said, "Wait a moment. You don't have to be too hasty about these things. You can come on a visit and sit down and live here and see how you like it here."

And she stayed for a while. So she made up her mind that she wanted to make her home there.

Q. How long was that? A. I could not exactly say just the date. I know when my children got out of school—school closed, I think, around about the latter part of June, and of course my daughter and my boy at that time happened to be gone to Hobart College at that time, and my daughter was teaching French and Latin in the Livonia High School, and they decided that they would come home on vacation to see their aunt, with them.

Q. Did she make up her mind where she wanted to live at that time? A. She made up her mind that she wanted to live in Geneva.

Q. What did you say? A. I said, "Things are not as good as they used to be; and if you want to live here, I don't see how I can afford to keep you here."

Mr. Adams. Your Honor, if he is going to talk about a contract with the deceased, I am going to object.

The Court. Do you mean you object to his testifying—

Mr. Adams. (Interposing) Yes, testifying to anything in the nature of a contract. He is saying that "Times
133 are different", and I am anticipating that he is going to talk about something flowing to him. I think that comes under 1064 of the Code: Where a person is deceased, the living person cannot testify.

Mr. Heron. Of course the issue raised by the plaintiffs here is want of consideration; and it seems to me that, on having tendered that issue, they have opened the door to testimony about it.

The Court. I think not. I sustain the objection.

By Mr. Heron:

Q. Did she return to Washington, if you know? A. She did.

Q. How did she come? A. She came in a car with my two children?

Q. How long did she remain away from Geneva? A. She remained—in Geneva?

Q. No, away from Geneva. A. Just about two nights.

Q. How did she return to Geneva? A. She returned by Lehigh Valley train.

Q. Do you know whether she came back alone? A. She came back here for the purpose of gathering up her papers.

Mr. Adams. I object.

Mr. Heron. Excuse me; I think the witness misunderstood.

By Mr. Heron:

Q. Do you know whether she came alone, back to Geneva?

A. Yes, she came back all alone.

Q. Did she bring anything with her when she
134 came? A. She brought her papers and trunk and everything.

Q. Do you know what papers they were? A. Her bank books and tax receipts and stuff like that and bills and also brought her trunk back. Because when she came the first time to Geneva she did not bring her trunk with her; but the second time when she came back to Geneva and then went back again, then she took her trunk with her to Geneva.

Q. Do you recall the time when the deed of this property here involved was made? A. When it what?

Q. When the deed to the property was made by her to you? A. Yes.

Q. Were you present when it was drawn and executed?

A. I was at the house, yes.

Q. Did you take any part in the conversations about it?

A. I did not.

Q. Were you in the room when it was being done? A. Sometimes, I guess, in; and sometimes, I guess, out. I was not really there all the time.

Q. While she was with you, what was the state of her health? A. She was a sick woman.

Q. What was the nature of her sickness? A. Why, she was complaining from the pit of her stomach—always complaining and always rubbing. Of course, during the time, my wife always made a hot-water bottle for her, to set on her stomach, or something like that.

Q. Was she in bed with that complaint? A. No,
135 she never really stayed in bed. She was in and out, but you never really could keep her in bed very long.

Q. Did she have any activity which she pursued when she was living with you? A. Oh, yes, sometimes.

Q. What did she do? A. She would go around, about, and darn her stockings and sew, and those things.

Q. Did she have any friends in Geneva? A. She had a very large number of friends in Geneva.

Q. Did she see them? A. Very frequently. They used to come up to the house, and then she used to go visit them, herself.

Q. Did she have any church affiliations? A. Yes.

Q. What was that? A. Greek Orthodox Church.

Q. What was her attendance? A. Very regularly, when she was feeling well; she would never miss a Sunday, hardly.

Q. Did there come a time when she was taken very seriously ill? A. Yes, she did.

Q. When was that? A. It was the time when I took her up to Clifton Springs for observation.

Q. When was that? A. I really could not recall
136 exactly. I think it was October or November.

Q. How long was she there? A. At the Clifton Springs sanitarium? She was there three days, I think.

Q. What happened after that? A. She asked the doctor there to have them call me on the telephone to come up to Clifton Springs to bring her back home to Geneva.

Q. Did she remain in your home from that time on? A. She remained in my home from that time until she died.

Q. Was there any change in her physical activity thereafter? A. Well, around the latter part of November or December she kind of got weak. I know when I took her to the Geneva General Hospital she insisted that I just call

the doctor. So I called the doctor, and he came up to the house, and she asked him, "I want to go to the hospital and I want to have an operation on my stomach."

And Dr. Bond said to her, "You are pretty old to have an operation."

Mr. Adams. Just a minute; I object to the statement of what someone else said to this lady. He is testifying what Dr. Bond said.

The Court. Of course, his statement itself is not evidence except so far as her reply may throw some light on the matter of her condition.

Mr. Adams. It might be admissible so far as her mental condition is concerned, but it is not admissible to
137 show the truth of what was said.

The Court. No; but I say it is admissible on the matter of condition.

Mr. Adams. Of what he said?

The Court. No; but his statement to the doctor is merely for the purpose of showing the meaning of her answer—not as proof of the doctor's statement; but if it elicited any reply from her, we can see what the reply was.

Mr. Adams. I will withdraw the objection.

By Mr. Heron:

Q. Will you tell us what she said there? A. When Dr. Bond came up to the house, she was not in her bed. She went to the living room and lay down on the couch. The doctor came in and examined her; and she told him that it was her pain right over here (indicating) and very severe.

Of course, he had been attending her before, previous to that. And she said, "I want to go up to the hospital, and I want to have an operation." And she said, "I am getting tired of suffering." She said, "I have been suffering terribly."

He said, "Well, you are pretty old to go through an operation."

She said to him then, "Well, I want to have an operation and I want to take that chance. If I get out of it all right

and get well, I will be satisfied. Otherwise I would just as well die." In other words, she wanted to take the chance.

Q. Did she go to the hospital after that time? A. She did; I took her the following day.

Q. Did she have the operation? A. No, she did not.

138 Q. How long was she there? A. She was there five or six days, I think.

Q. Did she die there? A. She died there in the hospital.

Q. During the period during which you knew her did you observe any change in her mental condition over those years? A. No, I did not.

Q. Was there a change in her physical condition? A. Just her physical condition.

Q. In your opinion was she capable of knowing what property she had? A. Absolutely.

Q. Did she ever discuss with you the property she had? A. She did.

Q. What did she say about it? A. She said that she had a home in Washington; she had money in the bank.

Q. Did she ever mention her children or grandchildren to you? A. No, she did not.

Q. She never discussed them at all? A. She did mention the doctor's—the grandchildren.

Q. When was that? A. That was during the time that she was there.

Q. Did she indicate that she understood the nature of the deed? A. Oh, positively; she did.

Q. How did she indicate that? A. Because one
139 night she was sick, and I called the doctor, late—
around about 10 o'clock at night. Of course, previous
to that she was talking about transferring the deed over to
me, and I said, always, "Well, take your time. You may
not like it here." I said, "Don't be too hasty on this thing,
and take your time until you definitely decide that you are
going to live with us." I said, "You may not get along
with my wife or with my children, after all."

She said, "No; your wife is all right. You have been
treating me fine, and you have fine children, and I want to
make my home here."

I said, "All right, if you want to make your home here."
 She said, "Well, I want to transfer this property to you."
 I said, "Why do you want to transfer this property to me?"

And she said, "Because"—

Mr. Adams. (Interposing) Your Honor, I think we have been into that question.

The Court. Yes. I sustain the objection.

By Mr. Heron:

Q. Do you know whether or not she could distinguish denominations of money? A. She does.

Q. How do you know that? A. Because on the birthday of my boy, on July 24, she took five dollars and gave him a birthday present and said, "There is five dollars for you."

Q. Where did she get the five dollars? A. From her pocketbook.

Q. Did she ever keep other money in it? A. Yes.

140 Q. Could you see what denominations she had?

A. Yes. She had different denominations—fives and tens and twenties.

Q. Did she have any assistance from anyone else in selecting that five dollars? A. Yes, she took them up and handled them (indicating).

Q. I say did she have any assistance from anyone in selecting it? A. Oh, no; no assistance in selecting it.

Q. Did she give any explanation as to her understanding of the financial condition of Dr. Deep's children? A. Yes; she said that Dr. Deep had left them around \$25,000. That is what she said.

Mr. Heron. That is all.

Testimony of Appellant John B. Kashouty (Cross-examination).

140 By Mr. Adams:

Q. Mr. Kashouty, you testified that at the time of Dr. Deep's death you were here in Washington and talked with Mrs. Deep? A. Yes.

Q. And at that time she said something to you about moving to Geneva with you? A. Yes, she did.

Q. Did you discuss that with any of her children—the fact that she wanted to move to Geneva with you? A. With any of her children?

141 Q. Yes. A. There was no one here but her son George.

Q. Did you discuss it with him? A. Did I discuss with him? I don't know whether I did or not. I could not say.

Q. Did you say anything to Mrs. Anthony Deep about her request to move with you? A. No, I did not.

Q. You stated that she wrote to you but that you never answered her? A. That is right.

Q. She could not write, could she? A. No, she could not.

Q. She would get someone to write for her? A. Positively, absolutely.

Q. When she was living with you did she get someone to write letters for her—some member of your family? A. I think so.

Q. One of your daughters? A. Possibly—I could not say, because I was not—

Q. (Interposing) Do your daughters understand Arabic? A. No. She could understand if you speak it, but I mean she does not understand it very fluently or know what it is all about.

Q. When she first came to Geneva, you testified, she told you she wanted to live there? A. That is right.

Q. Do you live at 372 Exchange Street, in Geneva? A. Yes, I do.

Q. Do you recognize that writing (indicating a
142 paper)? A. I really could not say (examining the paper).

The Court. I did not understand the answer.

The Witness. I really could not say whether I do or not (examining the paper).

I know it is not like my William's writing.

By Mr. Adams:

Q. Would it be— A. (Interposing) Marie's?

Q. Or anyone's in your household? A. No; because I know my wife's writing is not that way. But of course some of the writing, like this "Y"—and of course some of the letters there resemble more like my daughter's writing. But she never used "W's"—on the side there (indicating).

No; I could not say.

Q. You have no idea? A. No, I have not.

Q. You have no idea whose writing that might be? A. No, I have not.

Q. Do you know that at the time Mrs. Deep was living with you she was receiving rent from her property on Eighteenth Street? A. From Mr. Sado; yes.

Q. Sent to her by Mr. Sado? A. Yes, she did.

Q. Did she have occasion to write to Mr. Sado? A. No. She asked me, one time, that the rent—she did not receive her check as quick as she expected to receive it; and she said to me to write to Mr. Sado and ask the reason
143 why she did not receive the check.

Q. Yes? A. I said, "You know how lawyers are. Maybe he was busy. Why dont you wait and give him time, and he will send it down to you."

Q. Yes? A. Well, she did.

Q. During the time when Mrs. Deep was in Geneva, how long was she in the various hospitals? A. In the various hospitals?

Q. Yes. A. Well, she was only in the Clifton Springs sanitarium and the Geneva General Hospital; those were the only ones.

Q. Just the two hospitals? A. Yes.

Q. How long was she in the sanitarium at Clifton Springs? A. How long was it?

Q. Yes. A. I don't think over two or three days—or four or five—

Q. (Interposing) And how long was she in the hospital in Geneva? A. I imagine about four or five days—something like that.

Q. Four or five days? A. Perhaps. I really could not say definitely, because I don't remember those things very well, unless I look on the record.

144 Q. You testified that when you took her to the hospital in Geneva it was with reference to observing her for an operation? A. That is right.

Q. Did you communicate with any of her children about that? A. No. She did not want me to.

Q. You did not do it, either? A. She did not want me to.

Q. You knew, prior to the time when this deed was signed, that she was going to sign it? Didn't you testify that she told you she was going to, and you told her to take plenty of time on doing it? A. That is right; yes, I did.

Q. Did you, during the period of time between when you first learned that she was contemplating making this transfer and the time when she actually did, communicate with any of her children? A. No; I did not.

Q. You never wrote to any of her children— A. (Interposing) No, I did not.

Q. (Continuing) —telling them of it? A. No, I did not.

Q. How long have you known Mr. Chacchia? A. Mr. Chacchia?

Q. Yes. A. Oh, I have known him for quite a good many years. I knew him when he used to go to high school.

Q. Did you contact him with respect to preparing
145 the deed for transferring of this Washington property? A. No, I did not. She asked me to get an attorney.

Q. She asked you to get an attorney? A. Yes. So, naturally, I thought I would get Mr. Chacchia.

Q. So you called him? A. I called him; yes.

Q. Did you tell him what the purpose of your call was, with respect to preparing this deed? A. No, I did not; because after he got in the house, then they deliberated between both of them, and then he knew what she wanted.

Q. He did not know, until he got in the house, what she wanted? A. As far as I know.

Q. You did not tell him? A. No, I did not.

Q. Although you asked him to come? A. I asked him to come.

Q. Did you, during the time when you lived in Geneva and Mrs. Deep lived in Washington with Dr. Deep, and later with Dr. Deep and his wife, ever contribute any money to her? A. Contribute any money to her?

Q. Yes. A. Not after her son was graduated; no. But when she came to Geneva at the time her son was going to college, I did.

Q. And you gave her money? A. I gave her money.

146 Q. When was that? A. I beg your pardon?

Q. When was that? A. I really could not say exactly. I could not say; because we did raise quite a little money for her in the city of Geneva, from different people.

Q. You contributed along with others to that? A. Oh, yes, sure.

Q. You were not the sole contributor? A. Oh, no; no, no. I gave her some money; because at that time, as I said, she was living in Geneva for a while.

Q. As a matter of fact, didn't Dr. Anthony Deep work his way through college by himself, without any assistance from anybody? A. I don't think so—not without the assistance of his mother; because he could not do it. No one could do it.

Q. Mr. Kashouty, do you know how much money Mrs. Deep had when she arrived in Geneva the first time? A. No, I do not.

Q. Did there come a time when she was living there that she drew a check on a Washington bank in your favor, for a sum of money? A. No.

Q. Did you get in your possession something over a thousand dollars that had once belonged to her? A. The money was transferred from the bank in Washington into the Geneva National Bank—the National Bank in Geneva, New York.

Q. Yes? A. And it was deposited in a joint account.

147 Q. It was in your name and— A. (Interposing)
And her name.

Q. A survivorship account? A. Yes; but the money never was touched until after she died. She did not use any of it and I did not use any of it at all.

Q. Do you know the amount? A. Eleven hundred and some dollars.

Q. Eleven hundred and some dollars? A. Yes.

Q. She died in your house, did she? A. She died in the hospital, and was brought to the house.

Q. And all of her possessions were there? A. At my home, yes.

Q. Have you gone through her effects? A. Through her what?

Q. Her trunk, and so forth? A. Yes, I did, after she died.

Q. Was there an insurance policy in there? A. I did not see any.

Q. Did you find anything of value among her effects? A. No, just a couple of dresses and a coat, I guess.

Q. Just personal things? A. She had a gown which she purchased in Palestine, the Holy City there, and she asked me if anything should happen to her, the gown would be in her trunk, and that is the gown she wanted to be buried in.

Q. When this money was transferred from Wash-
148 ington to Geneva, did you talk with her about opening the account? Did you go with her when the account was opened? A. Did I what?

Q. Did you go with her, in Geneva, when the bank account was opened, in Geneva? A. Yes.

Q. Did you explain to her that upon her death it would go to you? A. That is right, I did.

Q. Who was present at that time? A. Who was present at that time, of the transfer?

Q. Yes—at the bank, when you transferred the money? A. I personally did not go to the bank for the transfer. I think the attorney did that.

Q. You signed the signature card, did you not? A. Yes, I think I did; but I don't remember that I went to the bank at that time.

Q. Did you notify any of her children or grandchildren that this transfer was being made? A. No, I did not.

Mr. Adams. That is all.

Testimony of Appellant John B. Kashouty (Redirect Examination).

By Mr. Heron:

Q. What was said to Mr. Chacchia when he was called to take care of this deed? A. I said that she wanted to have some paper drawn.

Q. Was anything said about what kind of a paper it was? A. Well, first she thought it was a will, and
149 then she decided she wanted to make a deed.

Q. Was anything said to Mr. Chacchia about exactly what kind of a paper it was to be? A. No. He did that, between her and him.

Q. Did you find any photographs or papers among her effects? A. Why, the only photograph she had, she had a little clipping with her son's picture, out of one Washington paper.

Q. What son was that? A. Anthony.

Q. Where was that? A. At the time of the suicide. And then she also had a big picture—a very large one; she had that on her dresser all during the time she was living. That was also Dr. Deep's picture.

Q. Do you know whether or not she went to the bank at the time the bank account was transferred? A. No, I do not.

Q. You do not know? A. No.

Q. What was her age? A. Well, of course that is pretty hard to say.

Mr. Adams. Your Honor, I am going to ask him to qualify himself as being in a position to qualify as to age.

Mr. Heron. I think that comes under the hearsay exception of family history.

The Court. If he has been told by either the decedent or by someone in the family what her age was, I think he can give generally what her age was.

150 Mr. Adams. As I understand the exception to the hearsay rule on the ground of pedigree, the statement would have to be made by a person now deceased.

The Court. As to age?

Mr. Adams. As to the age of whoever is in question.

The Court. I do not think so.

You can say what you know about her age.

The Witness. Well, according to her statement she was only about 72 or 73. That is what she always said; that is what she was telling us in Geneva.

But I took it, on account of my mother—and I knew the custom of the Syrian people—they generally get married around 15 or 16—

The Court. (Interposing) Well, that is enough.

The Witness. That is all I know.

* * * * *

Testimony of Mrs. John B. Kashouty (Direct Examination).

By Mr. Heron:

Q. Mrs. Kashouty, what is your Christian name?

151 A. Louise Kashouty.

Q. That is correct, is it not? You are Mr. Kashouty's wife? A. Yes.

Q. Your name is Louise Kashouty? A. Yes.

Q. When did you first come to know Mrs. Fannie Deep?
A. Well, just right after we were married—about three or four years after we were married.

Q. When was that? A. I would say about 1917 or 1918. I am not quite sure.

The Court. Speak louder, please.

The Witness. About 1917 or 1918. I am not quite sure of the date.

By Mr. Heron:

Q. Is she related to you? A. Yes. She is my father's first cousin.

Q. What were the occasions of your coming in contact with her? A. Well, we went to Washington at that time—that is, the whole family went there to stay there for a while; and that is how I happened to meet her. She came over to see us.

Q. Did you have any lengthy contact with her during that period? A. No, not much.

Q. How frequently did you meet her from that time until 1937? A. Well, the only time I would meet her is
152 when we would go to Washington; and that would be, oh, I should say about four or five times that I have been to Washington.

Q. What was her appearance, as you saw her? A. Well, she was just—she looked all right to me. I don't know; she seemed to be pretty—just like any ordinary, elderly woman would look.

Q. What was her manner of dress? A. Well, she dressed very plain, of course. She did not dress anything elaborate or anything like that. She had very plain clothes.

Q. Coming down to July of 1938, can you tell when you first met her after she came to Geneva? A. Yes. We were at the cottage at the time she came; and my son was there at the cottage with us. So he went back home; and he came back later in the evening and said that my husband's aunt was at the house, waiting for us.

So then I told my son to tell her to stay with my mother until we got back in the morning.

Q. What was her appearance when you found her there? A. Well, she was about the same as when I first met her. She dressed very plain, and the same as any ordinary, elderly woman would dress.

Q. What about her appearance so far as age was concerned? A. Well, it is hard to judge. I should say she was over 70, or something like that.

Q. Had there been any change during that time in her physical appearance? A. Well, she was not quite as stout as she was when I had last seen her.

153 Q. As far as age was concerned, did she show her age? A. Well, a little more than when I had seen her last.

Q. What about her observation of things that were going on around her? Was there any change in that, so far as you could tell? A. No, there was not.

Q. What did she do to pass the time, when she was there in your house? A. Well, sometimes she used to sit down and sew. We have a big porch, and she used to go out and walk around there and sit around there. And we used to take her out riding now and then; and every time we would go out, we would take her out with us.

Q. Did she seem well, physically, when she was there? A. Well, she complained of her stomach. She said she always had this pain in her stomach, every now and then.

Q. Did she have any requirements about food? A. Well, there were certain things she could not eat, that did not agree with her. And I used to have to prepare more liquids and things like that, that she could eat.

Q. Did she appear to be satisfied or dissatisfied with the food? A. She was very satisfied.

Q. Was she active physically? A. Well, she did want to work now and then; but I told her not to—to sit down and do other things that she did not have to do—that I would do anything she wanted, for her.

Q. Was she able to take care of the ordinary wants—washing her face and hands and things of that kind?
154 A. Yes, she could; and she would fix her bed now and then, and do little things like that.

Q. Was she able to bathe herself, so far as you knew? A. Well, no. Later on I had to bathe her. She said the only reason why she did not get in was she was afraid of slipping in the bathtub. She wanted to get in, but she was afraid of slipping.

So I had to go in and bathe her at night.

Q. Did she have any friends in Geneva? A. Yes, she had a lot of friends in Geneva.

Q. In general, what kind of people were they? A. Well, they were all people she knew years back, in the old country—Syria. She knew them very well. She used to go up and pay them a visit, and then they would come down and see her.

Q. Do you know whether or not those people came from the same part of Syria that she came from? A. Yes, they did; yes.

Q. Would she go and call upon them? A. Yes, she would.

Q. What about her religious activities? Was she active in a religious way? A. Very.

Q. What did she use to do? A. Well, she never went to bed unless she went in her room and prayed at least half an hour. Every morning and every night and every now and then she would be praying. She would go through the whole Bible, sometimes; she would be sitting there, reading.

155 Q. Do you speak Arabic? A. Yes, I do.

Q. What language did you ordinarily converse in, with her? A. Well, I spoke to her in Syrian most of the time.

Q. Did she go about and do any shopping, so far as you know? A. No. I used to do it for her.

Q. What about the appearance of the other women who were her friends? How did her appearance compare with theirs? A. About the same. You know, she seemed to enjoy their company. They would sit down and talk with her and talk about old days and about things back in the old country.

Q. What about their manner of dress? Was there any similarity in their dress? A. Well, they dressed very plain. I would not say—just ordinary dress; nothing elaborate, or anything like that.

Q. Do you know whether for the most part they are the first immigrants— A. (Interposing) What is that?

Q. Well, I withdraw that question.

Do you know whether or not she could tell the time of year and the dates? A. Yes, she would.

Q. How did she do that? A. Well, she can read the time; but the dates—she never looked at a calendar, or anything, but she always knew what day it was and what month and what year it was.

156 Q. She knew that in what language? A. In Syrian.

Q. In Syrian? A. Yes.

Q. What about her memory: How was that? A. Her memory was very good.

Q. What about her memory of casual things which were going along in the house? A. Well, lots of times she would sit down with me, in conversation at the table, and tell me about different things in the old country—that is, with other people, and different things that she had done.

157 Q. Did she ever discuss with you what property she had? A. Well, she did—about a house; she said she had a home in Washington.

Q. What did she say about it? A. She never said much to me about the house, but just mentioned that she had the home in Washington.

Q. Did she say anything to you about where she wanted to stay, when she first came in Geneva? A. Yes, she said she wanted to make her home with me. I told her that we did not have any room and we really could not take care of her right now, at present.

She said, "Well, don't worry about that. If you take care of me the rest of my days, it is all right; I will see about that."

Q. What was her condition at the time she made the deed, as far as her physical condition was concerned? A. She was all right. That is, she had these pains. That is all that I know.

Q. Was it any different from what it was in July when she came there? A. No.

Mr. Heron. That is all.

Testimony of Mrs. John B. Kashouty (Cross-examination).

By Mr. Adams:

Q. Mrs. Kashouty, do you know whose writing that is (indicating a paper)? A. I do not know; I could not tell you (examining the paper).

The Court. I could not understand you.

158 The Witness. Unless it is my daughter's writing; but I could not tell you.

By Mr. Adams:

Q. It might be your daughter's? A. It might be, but I cannot swear to it.

Q. Did she write letters for Mrs. Deep? A. She might have when I am not around.

Q. That is your address—372 Exchange Street (indicating the paper)? A. Yes. She might have written a letter for her when I was not around.

* * * * *

**Testimony of Mrs. Mary A. Chacchia
(Direct Examination).**

159 Mr. Heron. This witness is Mrs. Mary A. Chacchia, C-h-a-c-c-h-i-a.

By Mr. Heron:

Q. Did I spell that correctly? A. Yes, you did.

Q. Mrs. Chacchia, your residence is Geneva, New York; is that right? A. Yes.

Q. Did you know the decedent, Fannie Deep? A. Yes, I did.

Q. Will you speak a little louder, please, and more to the Judge? A. Yes.

Q. What was the occasion of your having any contact with her? A. Well, Mr. Kashouty called Mr.
160 Chacchia and told him that Mrs. Deep had—

The Court (interposing). I am not hearing what the witness is saying.

The Witness. Mr. Kashouty called Mr. Chacchia and told him that Mrs. Deep had some papers to be drawn. So we went up, together; and Mr. Chacchia introduced me, as his wife, to Mrs. Deep.

So she started to talk to us, and she showed us the clipping with her son's picture on it, and saying that he had committed suicide, and all this.

And she talked about her son quite a while before she started to talk about this paper that had to be drawn. Then she described all the property to Mr. Chacchia. She told him it was a brick building and was worth about \$5,000, and she went into details about the number of rooms and all that. I don't remember all that, but I know she did.

So we went down the street, there, and went to the office, and I typed the paper for her. And when we came back, she put her mark to it; and I signed, as witness.

By Mr. Heron:

Q. I hand you this deed (indicating) and ask you if that is the deed to which you have reference. A. Yes, that is.

Q. Who wrote her name as it appears at the bottom? A. I did.

Q. Who put the X mark which appears between it? A. Mrs. Deep.

Mr. Heron. Does your Honor care to see this? I
161 will offer it in evidence.

The Court. No.

By Mr. Heron:

Q. Did she have any assistance in putting it there? A. No, she did not.

Q. What was her physical appearance when you saw her there? A. Why, at the time we were there she had a blanket on her feet and had a hot water bottle. She had a cold, I guess.

But she talked quite a lot and seemed pretty strong, to me.

Q. Was she fully dressed? A. Yes. She had a black dress on—fully dressed.

Q. What part of the house was he in? A. She was in the parlor—sitting by the bay window, there, so she could watch the road.

Q. Did she seem to have any physical ailments, there? A. She coughed quite a bit when she talked.

Q. How long were you there that first time? A. The first time, we were there about 45 minutes, I think. And we came back. And we tried to make the second movie; so we were there probably about half an hour, and then went to the movies.

Q. Did she have any papers with her at that time, do you know? A. Yes, she had papers.

Q. Do you know what they were? A. No, I could not say what they were. I know we had a deed that we copied
162 the description of the property from; but I don't know what else she had.

Q. Was there any discussion as to the character of the instrument which was to be drawn, that you recall? A. Yes.

Q. What was that? A. She said she did not want a will; she wanted a deed drawn.

Q. Had there been any further discussion than that, about it? A. No; I don't remember, if there was any.

Q. Who were present in the room when the transaction occurred? A. Mrs. Deep and Mr. Chacchia and myself and Mr. Kashouty and his wife.

Q. Who took part in the conversations? A. Well, Mr. Chacchia and Mrs. Deep did most of the talking. She talked to me once in a while; she turned to me and talked to me.

When she described the property and all that she talked directly to him.

Q. Did either Mr. or Mrs. Kashouty take any part in the conversations? A. No; they did not.

Q. Did you ever see her again, after that? A. No, I never saw her.

Q. Just the two occasions on the same day? A. Yes.

Q. What is your opinion as to her ability to understand what she was doing there, at the time—that is, executing a deed on her property? A. Well, she was saying—she told them that, herself. It was in broken English but it could be understood.

Q. Did you have any difficulty in understanding her? A. Well, a little difficulty. But she repeated it so many times that you understood what she wanted, by the time she got through.

Mr. Heron. That is all.

**Testimony of Mrs. Mary A. Chacchia
(Cross-examination).**

By Mr. Adams:

Q. Was the Reverend Michael F. Massabini present at the time when this was signed? A. No, not when I was there.

Q. Where were you when this was signed? Were you in Mr. Kashouty's house? A. Mr. Kashouty's house; yes.

Q. You were there and got some papers and some information— A. (Interposing) Yes.

Q. (Continuing) —and came back to your office and wrote this deed? A. Yes.

Q. And then you went back to Mr. Kashouty's house? A. Yes.

Q. Mrs. Deep did not leave the house? A. No, she sat there.

Q. And Mr. Kashouty was present when these conversations were going on? A. Oh, yes.

164 Q. And he never said anything to her during that period of time? A. No. He sat in the chair and smoked and listened, and did not say anything.

Q. He never said a word? A. No.

Q. You were there 45 minutes, the first time? A. Yes.

Q. And half an hour the second time? A. Yes.

Q. And Mr. Kashouty did not enter into the conversation? A. Well, Mrs. Deep talked quite a bit—about her son, and kept talking about things like that.

Q. And Mr. Kashouty did not say anything? A. Well, I suppose he might have, after she signed the deed. But I don't remember clearly.

Q. He did not say anything in Arabic? A. No.

Mr. Adams. That is all.

Testimony of Rev. Michael Massabini

(Direct Examination).

167 Reverend Michael Massabini was called as a witness for and on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Heron. This witness is the Reverend Michael Massabini. His residence is in Geneva, New York.

By Mr. Heron:

Q. That is correct, is it not, Mr. Massabini? That is your name and your residence? A. Yes, right.

Q. What is your profession? A. Pastor of the St. Michael's Syrian Orthodox Church, in Geneva, New York.

Q. Did you know Fannie Deep, the decedent in this case? A. Yes, I knew her.

Q. When did you come to know her? A. Since she came to Geneva, in July, 1938.

Q. How frequently did you see her during that time? A. I used to see her every other day.

Q. Was she a member of your Church? A. Yes, of the Ladies' Club.

Q. Did she attend the services? A. Every Sunday and holidays.

Q. How frequently did she attend them? A.
168 Often.

Q. What was the occasion of your seeing her every other day? A. Well, she liked to see me because she was lonesome. Mr. Kashouty used to go to the store; and I would keep her company because she was a sick woman, and I would go see her and talk to her.

Q. Where would you see her? A. Where would I?

Q. Where would she be? A. In Mr. Kashouty's home.

Q. How long would you ordinarily stay with her when you were there? A. I would stay for a couple of hours every visit.

Q. During the time you visited her did she ever speak of the members of her family? A. Yes.

Q. Of what members did she speak? A. She spoke about her sons—about her sons' children.

Q. What sons were they, do you know? A. George and Michael; those were the only two sons she mentioned to me.

Q. What were the names? A. George and Michael.

Q. Did she ever mention a person "Anthony"? A. Anthony is the doctor who died; she told me how he committed suicide.

Q. Did she indicate any affection for her children or grandchildren? A. Oh, yes.

169 Q. For whom? A. For every one, I mean.

Q. In an equal degree, or was there any apparent difference in her feeling toward her children? A. Yes, she felt sorry and badly about them, and she did not want to talk to them.

Q. Did she ever mention that she had any property? A. Yes, she mentioned to me that she had a house in Washington.

Q. What did she say about it? A. She said she bought that house after her son's death, for \$6,000, and she collected \$25 a month rent.

Q. Did she say she had anything else? A. Cash money in the bank.

Q. Did there come a time when a deed or paper was executed by her? Do you recall that occasion? A. Yes.

Q. Were you there? A. I was there; yes.

Q. What happened when that was being done? A. Before she transferred the deed to Mr. Kashouty, she took my opinion. She wanted to reward Mr. Kashouty because he was taking care of her.

She told me what to do, and she told me to give the house to Mr. Kashouty.

So when she called the lawyer, they called me up; it was about one-thirty in the afternoon. And I signed the deed in her presence.

170 Q. I hand you what purports to be a deed and ask you if that is your signature there (indicating). A. That is right.

Mr. Heron. I ask that this be marked Defendant's Exhibit No. 1. I assume there is no objection.

Mr. Adams. None at all.

(Deed signed by Fannie Deep, by her mark, was marked Defendant's Exhibit No. 1 and received in evidence.)

By Mr. Heron:

Q. Can you tell me what happened at the time you signed your name to the paper? A. When I got to the house she told me she decided to turn over the deed to Mr. Kashouty; and the lawyer was there; so Mr. Chacchia read the deed to her and explained to her every word.

She said, "That is all right; that is what I want to do."

Q. Did you take any part in those conversations? A. Just when the lawyer was there, I took part—you know—like interpreter.

Q. What did you have to say about it? A. I did not say anything to her.

Q. Did you have any talk with her, in Arabic, while that was going on? A. In Arabic. She understood a few words in English. She was talking in English, too.

Q. Did you have any conversation with her in Arabic at that time? A. Yes.

Q. About what? A. About the deed. I asked if
171 she wanted to turn the property to Mr. Kashouty.

And she said, "Yes; I am willing to give it to him because he is taking good care of me. And no one wants me."

Q. And that conversation was with her, in Arabic, at that time? A. In Arabic, yes.

Q. What was her physical condition at that time? A. Well, she was complaining of stomach aches.

Q. Did she appear to understand what was going on around her? A. I beg your pardon?

Q. Did she appear to understand what was going on around her? A. Oh, yes—perfectly all right; she understood everything.

Q. Did you ever have occasion to hear her mumbling? A. Well, from her stomach, when she got a pain.

Q. Did you ever have an opportunity to understand whether she was merely mumbling or saying something? A. No, just saying, "Oh, my God!" from the pain; that is all.

Q. In what language would she say that? A. In Arabic.

Q. Is it a custom among old Arabic people—

Mr. Adams (interposing). I object to custom being shown, your Honor.

The Court. I sustain the objection.

172 By Mr. Heron:

Q. Are you familiar with Syrian people of her age? A. Yes.

Mr. Adams. I object to testimony about anyone else of her age. We are inquiring about her, and not about what others might be.

The Court. This particular question is unobjectionable. I overrule the objection.

Mr. Adams. All right.

By Mr. Heron:

Q. Are you familiar with elderly Syrian people? A. Yes.

Q. How did you come to be familiar with them? A. In Geneva?

Q. Just how do you come to be familiar with them? A. Well, I am their pastor, you see.

Q. Do I understand that such people are members of your Church? A. Oh, yes. I understand every one of them.

Q. Is it a custom among those people to give vent to feelings of pain? A. I object to that, your Honor—"the custom of people to give vent to pain".

The Court. I sustain the objection.

By Mr. Heron:

Q. What was the character of Arabic which this lady spoke? A. What do you mean?

Q. Was she limited in her use of Arabic, or just
173 what command did she have of the Arabic language?

A. The regular Arabic language.

Q. Did she speak clearly in Arabic? A. Yes.

Q. Did she have a wide or a narrow command of that language; that is, did she have a wide or narrow use of it?
A. Yes.

Q. What I want to know is whether or not she had a rather limited vocabulary or whether she knew only a few words or whether she could speak freely and fluently. A. Oh, no; she could speak freely and fluently.

Q. Did she ever tell you anything about the relation between Mr. Kashouty and her son, Dr. Deep? A. Yes.

Q. What did she say about that? A. The relation between Mr. Kashouty and Dr. Deep?

Q. Yes. A. He is his uncle; Kashouty is uncle to Dr. Deep.

Q. Were they friendly or unfriendly? A. They were friendly.

Q. Did she say that to you? A. Yes.

Q. She told you that? A. Yes.

Q. In your opinion was she capable of knowing what property she possessed? A. What property?

Q. Yes. A. Yes; she told me about it.

174 Q. And was she capable of understanding the nature of a deed or of a contract? A. Well, I explained it to her, every word, you see.

Q. After you explained it to her, do you think she understood it? A. Every word. Because after I explained it to her, she used to say a few words in English, you see—like “My son.”

Q. Was it after that explanation that this paper was executed? A. Yes.

Q. Do you think she understood at that time what other relations she had? A. Yes.

Q. Did you see her again after that paper was executed? A. Yes, I saw her.

Q. When was the last time you saw her? A. I saw her the same day she went to the hospital. She had to give up the communion; and she said to me, “I am glad I did that, and maybe I die in the hospital.” And she said, “That is all right.”

And she had to give up the communion.

Q. When did she die? A. Three days after that.

Q. Did you ever have occasion to observe her memory? A. Yes.

Q. In what way? A. She used to tell me stories from the Bible; and she could tell them all right.

Q. Did she have an ordinary recollection? A. Yes
175 —from the books.

Q. Was it an ordinary recollection, or better or poorer than ordinary? A. Better than ordinary. She used to tell me the Bible story for the coming Sunday, by heart.

Q. Was it good or better than ordinary? A. Well, it was better than ordinary. She surprised me, to know so much. She used to tell me everything on date—the next week after St. George’s, and everything like that. She used to tell me everything on date.

Mr. Heron. That is all.

* * * * *

Testimony of Rev. Michael Massabini

(Cross-examination).

By Mr. Adams:

Q. Reverend, how long have you known John Kashouty?

A. For the last three and one-half years.

Q. For the last three and one-half years? A. Yes.

Q. Does he attend your Church? A. Yes; he is the president of my Church.

Q. The president of your Church? A. Yes.

Q. Do the members of his family attend your Church?
A. Yes, every one of them.

Q. Were you present when Fannie Deep signed this deed by her mark (indicating the paper)? A. Yes.

Q. Were you present then? A. Yes, I was present.

Q. Who else was there when she signed by her
176 mark? A. The attorney, Mr. Chacchia, and his secretary—at that time.

Q. The attorney? A. Maurice Chacchia.

Q. The attorney, and who? A. And his secretary—that is his wife, but at that time she was his secretary.

Q. Who is Mary A. Annony? A. That is Mr. Chacchia's wife.

Q. Who is Laura A. Annony? A. Let me see it, please (examining the paper): that is the attorney and his wife.

Q. Is Laura A. Annony the wife of the lawyer? A. Yes.

Q. Who is Mary A. Annony? A. That is his secretary.
The Court. What was that?

(The paper was examined by the witness.)

The Witness. That is the one who wrote the deed on the typewriter.

By Mr. Adams:

Q. Were there two people by the name of Annony there?

A. Yes, two people, and Mr. Chacchia and me.

Q. And you saw her mark this "X" on this paper? A. Yes, I saw her.

Q. You say you explained this deed to her? A. Yes, word by word.

Q. Word by word? A. Yes.

177 Q. You translated this English— A. (Interposing) Yes, I translated the English into Arabic.

Q. (Continuing) —into Arabic? A. Yes.

Q. And you say she understood? A. Yes, she understood every word of that.

Mr. Adams. That is all.

* * * * *

Offer of Depositions in Evidence.

179 Mr. Heron. Your Honor, at this point we have four depositions that I want to read. Mr. Belew probably has the originals, I think, in the file.

Mr. Adams. Your Honor, these are written depositions of physicians. I was present at the taking of each one of them, and in each case the doctor was called in to treat the patient. Under 1073 of the Code I do not believe that they are admissible. If your Honor wants authorities I have them.

Mr. Heron. The first one, I might suggest, that I
180 intend to offer is the deposition of a physician who was attached to the sanitarium. Your Honor will recall that she went to a sanitarium for observation. He was called in because of his ability to speak Arabic; and he conversed with her. His deposition shows that he did not know whether she had any physical ailment at all, and his only purpose of being there was that of interpreter. I think your Honor is entitled to hear that deposition and also his conclusion from his conversation with her—his conclusion as to her mental condition.

Mr. Adams. Your Honor, the testimony is that he was on the staff. The statement by Mr. Heron notwithstanding, he was on the staff of this sanitarium. She was taken to the sanitarium for observation. He is a doctor; he made an examination of her; he talked with her in Arabic. Anything that he learned from her, in Arabic—

The Court. Yes, I exclude the deposition.

Mr. Heron. In order that I might preserve the record, I should like to offer it and ask that it be marked for identification as Defendant's Exhibit No. 2. It is in the record; and if it is agreeable, the reporter might mark it later.

The second one is the deposition of Dr. Bond. Your Honor will recall that he was present when the examination was made of her, prior to going to the hospital. It seems to me that under those circumstances the confidence is broken; and the evidence will further show that the occasion of this examination was not in any wise in connection with her mental condition. In other words, it was purely physical; and any observation which he made as to her mental state was incidental to that; and it seems to
181 me, for that reason, it would be admissible.

There is still a further reason, which is this: The statute which excludes the physician's testimony is a restriction on common law; and because of that fact the burden of showing that the deposition comes within the restriction of the statute rests upon the other party, rather than upon the plaintiff. There were undoubtedly portions of that deposition which, I think, were admissible; I think portions of that are admissible—although it is true that his examination of her was in connection with the physical ailment which she had; and he did not have any other examination, so far as the record shows, except in that connection.

The Court. I exclude that one, also.

Mr. Heron. Then, if your Honor please, I should like to ask the reporter to mark the depositions of Dr. Bond, Dr. Munford, and Dr. Achilles for identification as Defendant's Exhibits, with the next consecutive numbers.

(The depositions of Dr. Bond, Dr. Munford, and Dr. Achilles were marked Defendant's Exhibit No. 2 for identification, Defendant's Exhibit No. 3 for identification, and Defendant's Exhibit No. 4 for identification.)

Mr. Heron. If your Honor please, that concludes our case.

* * * * *

Deposition.

Interrogatories Addressed to Dr. E. Herndon Hudson

First Interrogatory: State your name, address and occupation?

Second Interrogatory: How long have you been a member of the medical profession?

Third Interrogatory: What academic training did you have?

Fourth Interrogatory: What degrees do you have?

Fifth Interrogatory: What special studies have you pursued in connection with your professional training?

Sixth Interrogatory: What experience have you had with mental diseases? Please answer in detail.

Seventh Interrogatory: Where were you practicing in November of 1938?

Eighth Interrogatory: Did Fannie Deep at that time come under your observation?

Ninth Interrogatory: What was the occasion of your having observed her?

Tenth Interrogatory: Can you describe her appearance?

Eleventh Interrogatory: Did she speak fluently in English, and if not, in what language was she fluent?

Twelfth Interrogatory: Do you speak Arabic?

Thirteenth Interrogatory: Did you and Mrs. Deep use the Arabic language as the medium of your conversations?

Fourteenth Interrogatory: What was the length of time during which you observed her?

Fifteenth Interrogatory: What was the nature of her illness?

Sixteenth Interrogatory: Did you have an opportunity to observe her mental condition?

Seventeenth Interrogatory: What, in your opinion, was her mental condition?

Eighteenth Interrogatory: Was she, in your opinion, capable of intelligently transacting business?

58 Nineteenth Interrogatory: Was she, in your opinion, capable of understanding the nature of a deed of land or of a contract?

Twentieth Interrogatory: Was she, in your opinion, capable of realizing who the members of her family were and what, if any, duty she might owe to them?

Twenty-first Interrogatory: Have you at any time ever lived in Syria or Asia Minor, and if so, where?

Twenty-second Interrogatory: Do people of Mrs. Deep's racial group come from that part of the world?

Twenty-third Interrogatory: Have you had occasion to observe them against their own social and economic background?

Twenty-fourth Interrogatory: Was Mrs. Deep similar or dissimilar to her own racial group as they live in the places which were mentioned?

Cross-Interrogatories To Be Addressed to Dr. E. Herdon Hudson

Cross-Interrogatory No. 1: Do you hold yourself out as a psychiatrist or specialist in mental diseases?

Cross-Interrogatory No. 2: Have you ever treated patients for mental disorders?

Cross-Interrogatory No. 3: How many patients have you treated for mental disorders?

Cross-Interrogatory No. 4: What was the date of the last case of treatment for mental disorders which you administered?

Cross-Interrogatory No. 5: What was the nature of the complaint which occasioned Mrs. Deep's visit to you, or your visit to her?

Cross-Interrogatory No. 6: Was she, in your opinion, suffering from any physical disorder?

Cross-Interrogatory No. 7: How many times did you have occasion to examine her or have her come under your observation?

Cross-Interrogatory No. 8: What was the length of time required for your examination on each instance?

Cross-Interrogatory No. 9: Did you ever see Mrs. Deep in other than a professional capacity?

60 *Deposition of Dr. E. Herndon Hudson*

The deposition of Dr. E. Herndon Hudson upon written interrogatories was taken pursuant to the notice, interrogatories and cross-interrogatories hereto appended.

Dr. E. Herndon Hudson, being first duly sworn, gave the following answers to the interrogatories and cross-interrogatories hereto annexed:

Interrogatory No. 1: E. Herndon Hudson, No. 44 Elmwood Place, Athens, Ohio, physician.

Interrogatory No. 2: Twenty-one years.

Interrogatory No. 3: B. A., Millikin University, Decatur, Illinois; M. D., University of Pa., Philadelphia, Pa.; D. T. M. & H., School of Hygiene and Tropical Medicine, London, Eng.

Interrogatory No. 4: Same as last question.

Interrogatory No. 5: None.

Interrogatory No. 6: The usual amount seen in general practice.

Interrogatory No. 7: Member of the medical staff of the Clifton Springs Sanitarium, Clifton Springs, New York.

Interrogatory No. 8: Yes.

Interrogatory No. 9: Dr. Munford asked me to drop into her room and make her acquaintance. Because of the fact that I spoke Arabic he thought I might help him in the diagnosis and conduct of her case.

61 Interrogatory No. 10: She was a gray haired, Syrian woman of rather untidy appearance.

Interrogatory No. 11: She was not fluent in English; she spoke fluently in Arabic.

Interrogatory No. 12: Yes.

Interrogatory No. 13: Yes.

Interrogatory No. 14: I had two or three conversations with her each perhaps of one-half hour in length in the course of two or three days.

Interrogatory No. 15: I am not aware that she had any serious illness.

Interrogatory No. 16: I had the opportunity which such conversations would provide.

Interrogatory No. 17: In my opinion her mind was clear upon all essentials. I would say she was well oriented in time and space and she did not exhibit any apparent illusions.

Interrogatory No. 18: Yes.

Interrogatory No. 19: Yes.

Interrogatory No. 20: Yes.

Interrogatory No. 21: Yes. Beirut, Syria, 1911 to 1914; Beirut, Syria, 1922 to 1924; Deir-ez-Zor, Syria, 1925 to 1927; Deir-ez-Zor, 1928 to 1936.

Interrogatory No. 22: Yes.

Interrogatory No. 23: Yes.

Interrogatory No. 24: Similar. She struck me as a typical, untidy, garrulous, elderly, Lebanese woman with a pretty definite mind of her own.

Cross-Interrogatory No. 1: No.

Cross-Interrogatory No. 2: Yes. In connection with general practice and as a member of the staff of the Clifton Springs Sanitarium, an institution to which cases of this character are sometimes referred.

62 Cross-Interrogatory No. 3: A definite figure is impossible, but estimates might range up to five hundred.

Cross-Interrogatory No. 4: September 22nd, 1940.

Cross-Interrogatory No. 5: I saw her at the request of Dr. Munford. I don't recall that she was complaining of any particular symptom.

Cross-Interrogatory No. 6: Not to my knowledge.

Cross-Interrogatory No. 7: I had two or three conversations with her in the course of two or three days.

Cross-Interrogatory No. 8: Each time about one-half hour.

Cross-Interrogatory No. 9: No.

E. HERNDON HUDSON, M.D.
DR. E. HERNDON HUDSON

STATE OF OHIO: ATHENS COUNTY, ss:

I, Foster Cornwell, City Solicitor of the City of Athens, Ohio, and a notary public in and for the County of Athens, State of Ohio, do hereby certify that the foregoing is a true and correct record of the deposition taken before me pursuant to the interrogatories hereto annexed. That the witness was duly cautioned by me and by me sworn to tell the whole truth and nothing but the truth in the action first above mentioned, and the deposition is a true record of the testimony given by the witness. I am not of counsel or attorney to any of the parties, nor interested in the event of the cause. The testimony of the witness was reduced to typewriting under my direction, and subscribed by the witness.

Dated October 31st, 1940

FOSTER B. CORNWELL
*Notary Public, in and for
Athens County, Ohio.*

(Seal) My commission expires: 10-16-1941

* * * * *

DEFENDANT'S EXHIBIT NO. 1.

210 Endorsed: Filed Mar 5 1941 Charles E. Stewart, Clerk.

This Deed

Made the 17th day of September in the year One Thousand Nine Hundred and thirty-eight, by and between FANNIE DEEP, now residing in the City of Geneva, New York and formerly of Washington District of Columbia, party of the first part, and JOHN B. KASHOUTY of the City of Geneva, County of Ontario and State of New York, party of the second part:

WITNESSETH, That in consideration of the sum of Ten and more dollars, mutual love and affection and other good and valuable consideration, the party of the first part does hereby grant unto the party of the second part, in fee simple, ALL THAT PIECE OR PARCEL OF LAND together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the District of Columbia, described as follows, to wit:

Being lot numbered One Hundred and Ninety-four (194) in Jacob B. Shapiro's subdivision of lots in Square numbered Forty-two Hundred and Two (4202) "Granby", as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 81 at folio 192; subject to the building restriction line as shown on said plat; subject to the covenants that said property shall never be rented, leased or conveyed to or in trust for or used or occupied by any negro or colored person or any persons of negro blood or extraction, and that this covenant shall be inserted in all deeds to lands in said square; this covenant shall run with the land.

Property conveyed subject to a lease running for two years from April 1, 1938 at \$25.00 a month, to Mike Deep, lessee.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed; and that she will execute such further assurances of said land as may be requisite.

Witness her hand and seal the day and year hereinbefore written.

her
FANNIE (X) DEEP (Seal)
mark

In presence of:

Witness to mark:

MARY A. ANNONY

REV. MICHAEL T. MASSABINI

LAURA A. ANNONY

211 State of New York
County of Ontario ss.:
City of Geneva

I, M. MAURICE CHACCHIA, a Notary Public in and for the County of Ontario aforesaid, HEREBY CERTIFY, that FANNIE DEEP, who is personally known to me as the grantor in and the person who executed the foregoing and annexed Deed, dated September 17, A.D. 1938, personally appeared before me in the said City of Geneva, County of Ontario and State of New York and acknowledged the said deed to be her act and deed.

GIVEN under my hand and seal this 17th day of September, 1938.

(Seal) M. MAURICE CHACCHIA,
Notary Public.

State of New York,
County of Ontario, ss.:

I, FRED M. BELL, Clerk of the County of Ontario, and also Clerk of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that M. Maurice Chacchia whose name is subscribed to the certificate of proof, acknowledgment or affidavit of the annexed instrument in writing, was, at the time of taking such proof, acknowledgment or affidavit, a NOTARY PUBLIC in and for said County, duly Commissioned and sworn and authorized to take and Certify the same; and authorized by the Laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York; and further, that I am well acquainted with the hand writing of such Notary Public and verily believe the signature to the said certificate of proof, acknowledgment or affidavit is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Canandaigua, N. Y., the 5th day of October, 1938.

(Seal) FRED M. BELL,
Clerk.

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1941.

No. 7856

JOHN B. KASHOUTY, *Appellant*,

v.

ANTHONY DEEP, JR., ET AL., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

WALTER M. BASTIAN,
ALBERT F. ADAMS,
JOSEPH S. SADO,
Attorneys for Appellees.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1941.

No. 7856.

JOHN B. KASHOUTY, *Appellant*,

v.

ANTHONY DEEP, JR., WILLIAM DEEP, By their
Mother and Next Friend, Mrs. Anthony Deep, et al.

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLEES.

COUNTER-STATEMENT OF THE CASE.

This was a suit to set aside a deed made by Fannie Deep to John B. Kashouty conveying lot 194 in square 4202 in the District of Columbia on the ground of undue influence and unsoundness of mind. Fannie Deep was the owner of this lot, which she had purchased with her own funds which she received from an insurance policy on the life of her son, Anthony Deep, who died in December of 1937. In June, 1938 she executed a will, leaving the bulk of her estate to her

daughter and grandchildren who are among the parties plaintiff to the suit. The defendant, Kashouty, was not mentioned in this will (Appellant's App. 4, 5). The following month, July, 1938, she went from Washington to live with the defendant Kashouty, her nephew, in Geneva, New York (Appellant's App. 32) and continued to live with him until she went to the hospital a few days before her death, which occurred on December 7, 1938. The Court found that she was then evidently over 80 years of age, in ill health, and in an enfeebled condition. She spoke Arabic and had but a limited knowledge of English. The Court further found that although she was not of unsound mind at the time of executing the deed in question, her feebleness of body made her all the more susceptible to the influence of her nephew, the defendant Kashouty, whom she trusted (Appellant's App. 14).

The deed sought to be set aside was executed on September 17, 1938, was recorded on October 24, 1938, and was prepared by Kashouty's own lawyer. She had no independent advice.

Kashouty testified that when he was in Washington, at the time of Anthony Deep's death, Mrs. Fannie Deep said something to him about moving to Geneva with him, but that he did not discuss it with either her son or her daughter-in-law with whom she had lived for many years (Appellant's App. 39). Kashouty also testified that although he knew for some time prior to its consummation of her intention to transfer the property to him, he had not communicated with or written to any of her children, telling them of her proposed action (Appellant's App. 41); nor did said defendant notify them or Mrs. Deep's grandchildren of the transfer of her bank account from her sole name in a Washington bank to a joint survivorship account with the defendant in a Geneva bank. With respect to this last mentioned transfer, it is in evidence that in addition to the house which was deeded outright to Kashouty, money, ranging from \$1100.00 to \$1500.00, which was the sole prop-

erty of Fannie Deep and which was in a bank in Washington in her name, was placed to the credit of Kashouty and Mrs. Deep in a joint survivorship account in a Geneva bank (Appellant's App. 24, 42, 43). Thus apparently all of her property passed into the defendant's name or control except "a couple of dresses and a coat" (Appellant's App. 43) and the gown in which she was buried.

The court concluded from the testimony that the deed in question was invalid and void; and judgment was entered declaring the deed invalid, void and of no effect (Appellant's App. 15). From this judgment the defendant Kashouty has appealed.

STATUTES INVOLVED.

The only statutes involved are those set out in appellant's brief, pages 10 and 11.

SUMMARY OF ARGUMENT.

A. There was evidence of undue influence.

1. Confidential relationship of parties.
2. Inequality of relationship through sickness, age, mental condition, etc. of grantor.
3. Beneficiary preparing or procuring the preparation of the instrument.
4. Lack of independent advice.
5. Transfer contrary to previously expressed intention.
6. Lack of consideration plus age, weakness, etc. of grantor.

B. The District Court had jurisdiction to entertain this suit.

C. A physician may not testify as to things learned by him while assisting another physician in making an examination.

ARGUMENT.

A. There Was Evidence of Undue Influence.

Fannie Deep was a lady of Syrian birth over 80 years of age in ill health and in an enfeebled condition at the time she made the conveyance complained of. She had, in December, 1937, lost her son, from whom she had gained her support for many years, and who left her the money with which she purchased the real estate in suit. She spoke Arabic but was largely ignorant of the English language (Appellant's App. 12, 13). Her condition of mind was that "No one wants me" (Appellant's App. 57). Old and ill, she went to Geneva, N. Y. away from her surviving children and grandchildren, and the defendant Kashouty proceeded, while she was living in his house, to procure for himself her entire property.

"Undue influence, it is true, is in general a subtle influence, a specie of fraud, difficult to be proved, and difficult to be disproved. In general, its existence can only be established by circumstantial evidence, and by a concatenation of circumstances. The presumption of its exercise does not arise except where an advantage has accrued to a party under condition of existing fiduciary or confidential relations which make it incumbent upon the party to show the fairness of the transaction drawn into question." *Towson v. Moore*, 11 App. D. C. 377 (381).

When, to the confidential relationship of the parties, there is added an inequality of relationship through sickness, age or mental condition of the grantor, where the transfer is contrary to previously expressed intention, where there is lack of independent advice for a person mentally or physically sick, where there is lack of consideration, with the added factors of extreme age and weakness mentally and physically of the grantor, a presumption of undue influence is raised which can only be dispelled by a showing on the part of the grantor that the transaction was fair, just and equitable.

The "circumstantial evidence" of undue influence and the "concatenation of circumstances" (*Towson v. Moore, supra*) are made up in this case by the circumstances of the parties, the inequality of their relationship, the preparation of the instrument in question by the beneficiary's own attorney, the lack of independent advice on the part of the donor, the transfer of the property contrary to her previously expressed intention, and by the lack of consideration. We shall proceed to cite under each of these several subdivisions the cases applicable to the facts, breaking the same down into the aforementioned six divisions. Some cases fall into several of the divisions but for economy of time and space are cited only under one.

1. *Confidential Relationship of the Parties.*

In *Moran v. Sullivan*, 12 App. D. C. 137, we have a very similar situation to the instant case. We quote somewhat extensively from the opinion of the Court in that case:

"On September 21, 1893, there were placed on record among the land records of the District of Columbia, a paper purporting to be a deed of conveyance from one Alice Moran to the appellee, James D. Daly, under date of August 26, 1893, . . . Four days afterwards, on September 25, 1893, there was placed on record another paper purporting to be a deed of conveyance from the same Alice Moran to the appellee, James Sullivan, . . .

"It appears from the record that Alice Moran, a woman upwards of 78 years of age at the time of the alleged execution of the deeds in questions, and who had been a widow upwards of 40 years. . . .

"Since the death of his wife Rosetta, the appellee Daly continued to reside in the house with his mother-in-law as a member of her family, and so continued until her death. . . . Alice Moran died on February 15, 1896; and both suits were revived in the names of her grandchildren as her heirs at law. A paper purporting to be her last will and testament and to have been executed on March 25, 1893 was offered for probate, and after some contest over it in the Orphans' Court, was admitted to probate. This will devises the property de-

scribed in the Sullivan deed to her daughter-in-law, Margaret Moran, in trust for the appellants, the grandchildren of the testatrix. In the Georgetown property, that mentioned in the Daly deed and wherein the testatrix resided, the will gave a life estate to Daly, and devised the remainder in the same way as the previously mentioned property. . . . Whether Alice Moran, now deceased, was or was not, at the time of the alleged execution of the deeds in question, so unsound of mind as to be incapable of making a valid deed or contract, it is quite certain from the record that her mental faculties at that time were so weak and feeble as easily to subject her to any influences that might be brought to bear upon her. Twice in his testimony the appellee Daly himself admits her extreme feebleness in this regard. It is also very clear from the testimony, that Daly, an inmate of her household for twenty years and upwards, a member of her family, practically occupying the position of a son to her, practically the only member of her family residing in her house, having constant and intimate intercourse with her, evidently attending to her business when she became incapacitated from doing so herself, claiming himself to have enjoyed her trust and confidence, and to have been employed by her as her agent in one of the transactions under consideration, that with Sullivan, and claiming also to have been intended by her to become the special object of her bounty as against the enmity of the appellants, was in fact in such a position of trust and confidence towards her, that it was easy for him, in the condition of mental impairment which is shown beyond reasonable doubt to have existed in her case, to exercise undue influence upon her. And it is also very clear that by the deed in question, he procured a benefit to himself without any adequate consideration, if indeed, there was any consideration whatever, which we regard as more than doubtful; for we regard the alleged delivery to her of a roll of bills as a mere sham and pretence. From all this it necessarily follows that the burden was upon him to show that the transaction by which he acquired the title to the property in question was entirely fair and just, and that it was voluntary on the part of the grantor. This, we think, he has utterly failed to show.

“The Supreme Court of the United States and this court have repeatedly held that vested rights and solemn instruments of record are not to be overthrown except upon clear and unequivocal proof of their invalidity. But it is likewise equally well settled by repeated decisions of courts of equity in England and America, that when, at the time of any given transaction, a fiduciary or confidential relation is shown to have existed between the parties, and the opportunity for the exercise of undue influence is shown to have been present in the relation and circumstances of the parties, and the one in the superior position of being able to exercise the influence has in fact procured a benefit to himself from the other, a court of equity will not allow the benefit to stand without clear and satisfactory proof of the entire fairness of the transaction. Pomeroy’s Eq. Jur., Sec. 956; 27 Eng. & Am. Cycl. of Law, Title, Undue Influence, where the authorities on the subject are cited.

“By all the authorities the burden of proof of the fairness of the transaction in such cases is placed upon the beneficiary of the transaction. In the present case, the beneficiary, Daly, so far from proving that the transaction between him and his aged mother-in-law, Alice Moran, was fair and just, has told a most incredible story concerning it. . . . Remarkable and unusual precautions seem to have been taken in the execution of the transaction, which need not here be specified in detail. Suffice it to say that such precautions are not ordinarily taken by honest men in their ordinary honest transactions. Honesty is not usually astute; fraud ever is.”

Another case from this jurisdiction which is in point is that of *Hagerty v. Olmstead*, 30 App. D. C. 174, and we quote from the language of the Court in that case:

“Coming to the question of undue influence, it must be remembered that the will was made when testatrix was *in extremis*, about twenty-four hours before she died. The executor and residuary legatee was looking after her business affairs, was present when testatrix produced a penciled memorandum of the disposition she desired made of her property, knew that his brother, his wife, and he were the chief legatees under the will,

advised testatrix that probably the memorandum would not stand in court if contested, suggested that a will be drawn in legal form, had such will prepared, left out a small bequest appearing in the memorandum to the matron of the hospital, for the reason, as he states, that if it had been embraced in the will it might have given the impression that undue influence had been exerted upon the testatrix; and finally he took the will to her, summoned witnesses, and supported her up in bed while she signed it. The mental state of testatrix in her enfeebled condition was such as to make her easily a victim of designing persons. As the court said in *Walls v. Walls*, 30 Ky. L. Rep. 948, 99 S. W. 969: 'Incapacity opens the door to undue influence, and when opportunities for such influence are shown, and the favored devisees are the beneficiaries of a will unnatural in its provisions, to the exclusion of others having equal claims at least upon his bounty, very slight circumstances are sufficient to make the question of undue influence one for the jury.'

'It is not necessary that there be direct proof of fraud or undue influence. It is competent for the court to submit to the jury all the circumstances concerning the execution of the will; and when it appears that confidential relations existed, as in this case, between the testatrix and the principal beneficiary under the will, it is for the jury to infer from all the evidence before it whether or not the execution of the will was the result of improper inducement or fraud. We think the admitted transactions of the executor and chief beneficiary in connection with the execution of this will were sufficient to raise a presumption of undue influence, and cast upon him the duty of rebutting it by showing that the will was made as the free and voluntary act of the testatrix. The law is well settled in such a case. 'General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption, which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefited stands in a confidential relation to the testator. 'Where the party,' says Mr. Redfield, 'To be benefited by the will

has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation.
 . . . ,”

The Maryland case of *Mills v. Glenn*, 152 Md. 464, 136 A. 831, is closely akin to this case. There, as here, a relationship existed which the Court held was, if not “confidential” in the strict sense of the term, “such, nevertheless, as the law regards with scrutiny.” There, as here, was an old woman (not so old as Mrs. Deep), infirm, the parties were living in intimacy with the there testatrix, she was dependent upon their care. “They were in a favorable position for obtaining an unfair advantage if they desired”. In that case, the beneficiaries under the will did not procure the attorney who drew the will. The facts in that case were as follows:

Grantor, Kate Glenn, was a colored woman, 71 years of age, crippled, infirm, and illiterate. Her husband's employment as a barber kept him away from the house during most of the day and at night leaving her alone. In February, 1924, six months prior to her death she suggested to her husband that they take someone into the house with them to aid her. He consented and William and Mamie Mills were brought in. William had boarded at the house for short periods before. Just what was the general relation which resulted between Kate Glenn and the Mills was not made definite by direct testimony. On April 21, 1924 Kate Glenn unknown to her husband executed a will in which she left her house and almost all of her property to Mills. The attorney who prepared the will was procured by someone other than Mills and neither he nor his wife was present at the signing. On June 25, 1924, she executed the deed to Mills and his wife; this also being unknown to her husband. The deed was taken to her by the secretary of a building association who fully explained it to her.

“Arguments have been presented . . . on the question whether the grantees had the burden upon them because of their standing in a relation of trust and

confidence to the donor, and under a duty of protecting her interests, so that they must disprove any fraud or any undue influence in taking an advantage or profit from her (citing case) but we think on the facts shown the placing of the burden of proof is without decisive importance. Those facts and circumstances seem to us to prove fraud or undue influence sufficiently.

"There is no direct testimony of it in this case, but procurement of a deed by fraud or undue influence may, of course, be proved by circumstances (citing case) and as circumstances tend more or less to prove it, the need of direct testimony will vary (citing cases). The grantor here was a woman so situated in life that the provisions of a home, for her old age especially, would naturally be a subject of anxiety; and a home owned and secured would not be lightly given away. . . . It appears very unlikely that of her own free will she would dispose of it without receiving any considerable part of its value, thus throwing herself and her husband in their old age, and in her extremity, upon the benevolence of others for a home and in part for support. Here, as in *Cherbonnier v. Evitts*, 56 Md. 276, 293, the relation of the grantees to the grantor—

'were, if not "confidential" in the strict sense of the term, such, nevertheless, as the law regards with scrutiny'.

They were living in intimacy with her, and she was much dependent upon their care. They were in a favorable position for obtaining an unfair advantage if they desired, and if it could be done. See *Hammersley v. Bell*, 134 Md. 172, 106 A. 339, and *Horner v. Bell*, 102 Md. 435, 62 A. 736; *Grove v. Spiker*, 72 Md. 300, 20 A. 144. . . ."

In *Chase v. Hubbard*, 153 Mass. 91, 26 N. E. 433, on a bill to set aside a conveyance on the ground of undue influence, there was evidence that complainant, the grantor, was a widow, 66 years old and in feeble health, when she rented defendant the house in which she lived, reserving two rooms for herself; that a year from that time defendant had secured the management of all her property, displacing her former manager; that he soon thereafter obtained a will

in his favor from complainant, which was drawn by his lawyer and witnessed by a doctor whom defendant had procured, the lawyer and one of the defendant's employees, that this will was kept secret at defendant's request and soon after that the deed in controversy was made; that complainant had given defendant various sums, and that she had promised to help fit up the house for his business, though she was not interested in it. *Held* sufficient to justify the setting aside of the conveyance, notwithstanding defendant and his witnesses testified that complainant fully comprehended the transactions, and had uttered expressions of gratitude toward defendant.

See also *Guenther v. Kurtz*, 204 Iowa 732, 216 N. W. 39:

Grantor was a widow about 69 years old with no children. She had been born in Germany and spent the first 30 years of her life in that country. Her education was quite limited, and, prior to the death of her husband, she had little, if any business experience. She was unable to speak or understand the English language with ease. On March 27, 1922 she conveyed the property in question to her niece the deed reciting "the sum of valuable consideration and \$1, in hand paid by Neva K. Kurtz." The court among other grounds for declaring the deed invalid says, "Furthermore, the consideration recited in the deed is grossly inadequate, and when this fact is coupled with the mental and physical impairment of the grantor, as is shown in the instant case, equity will not permit the deed to stand. This bears on the question of fraud. See *Cassaday v. Bickford et al* 183 Iowa, 973, 168 N. W. 162; *Galbraith v. McLaughlin*, 91 Iowa, 399, 59 N. W. 338; *Herron v. Herron*, 71 Iowa 428, 32 N. W. 407. . .

"It must also be remembered that the grantor had no independent advice in the matter. Her attorney was not consulted and it would appear that the grantee and her aids saw to it that no independent advice or counsel should be secured. The grantor was as inexperienced in business matters as a child. She was unable to speak or understand the English language with ease. It was quite natural for her in her then condition to rely upon her brother and her niece, when she was told that steps

would be taken by a certain relative to take her property from her. Implicit confidence could be expected from this old lady under such circumstances. Whether we view the transaction within the zone of fraud or undue influence, it makes little difference. Sufficient that from the circumstances imposition or undue influence will be inferred. *Albre v. Jewell* 94 U. S. 506; *Jordan v. Cathcart* 126 Iowa 600 . . . After the execution of the deeds in question the appellant-grantor remained in possession of said real estate at all times subsequent, and exercised all the incidents of ownership. She collected rents, made repairs, paid taxes and met with no objection from either of the grantees in the deeds."

See also the following further cases on this point:

"There is running through the cases in which the question has been considered this principle that, where the relationship between the parties to a transaction which is the subject of judicial examination is such that one must from the very necessities of the situation repose confidence in the other, and where the one in whom such confidence is reposed is thereby enabled to exert a dominating and controlling influence over the other, a confidential relationship may be presumed. *Todd v. Grove* 33 Md. 188; *McGill v. Nichols*, 157 Md. 294, 145 A. 773; *Pomeroy Eq. Jur. Para.* 956. Illustrating the application of that principle, it was held in *Beinbrink v. Fox*, 121 Md. 104, 88 A. 106, 'that, where an aged parent makes a conveyance to a child, the burden is cast upon the grantee of establishing the fairness of the transaction.' " This case although quite lengthy both as to facts and discussion of law and therefore almost impossible to condense, sheds considerable light on the present question.

Tracey v. Tracey, 160 Md. 306, 153 A. 80.

Grantor was on November 12, 1923, over 80 years old when she executed the deed in question conveying her farm to appellant. In December, 1917, she made a will (which had not been revoked at her death) whereby she devised all of her property to respondent. The testimony was in conflict as to her mental condition. Grantor was living with grantee, a nephew, at the time

of the execution of the deed. "We have concluded that the evidence as to grantor's weakened mental condition and the evidence of the acts and conduct of the appellant, together with the unnatural and unexplained disposition of her property by grantor to appellant for the meager consideration of support for the few remaining months of her life are such as to authorize the trial judge in setting aside the deed on the ground of undue influence, if for no other reason." and again "Where the grantor or testator is old and feeble and weak physically and mentally and the giving of his or her property by a deed or its devise by will is secretly brought about and such disposition is an unnatural one, in view of the previously expressed intent, and where there is present the opportunity for the grantee or devisee to have exercised undue influence and it was to his or her advantage to exercise such influence, those facts, together with the proof of other facts and circumstances showing a disposition on the part of the one benefiting thereby to poison the mind of the grantor or testator against other relatives such facts and circumstances are sufficient to establish as a fact the use of such undue influence.

Morris v. Morris, 4 S. W. 2nd 459.

"Lloyd admitted that Mrs. Addis looked upon him as her closest friend, and that he had advised her on business matters, paid bills for her, and felt more or less interested in her. The fiduciary relationship between him and her was fully established. It was his duty to protect her so far as he reasonably could, from an unfair and prejudicial alienation of her property. *Dowie v. Driscoll*, 203 Ill. 480, 68 N. E. 56; *Berry v. Egan*, 291, Ill. 377, 126 N. E. 121. . . . A fiduciary relation and the duties involved are not necessarily legal, but they may be moral, social, domestic, or merely personal. *McCord v. Roberts*, 334 Ill. 233, 165 N. E. 624. Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other, and perhaps new, cases might be excluded. Transactions between a party and one occupying a fiduciary relation to him are prima facie voidable upon the latter's motion, and, the relation being established, the burden is upon the other party to show an absence of

undue influence by establishing that the transaction was in good faith upon his part and was equitable and just between the parties. *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808. It is hard to conceive anything more inequitable than depriving a feeble woman, ninety years of age, of the only home she had and bestowing it upon another without any present monetary consideration. If there was an existing moral obligation on the part of Mrs. Addis to specially reward Mrs. Grange for past services and attention, good faith would have required Lloyd to have at least drawn the deed in conformity with what he says were his directions; that is, to see that Mrs. Grange got the home after the death of her mother. . . . The duty is upon the beneficiaries to vindicate the bargain or gift from any shadow of suspicion and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize such transactions with great severity. *Schrader v. Schrader*, 298 Ill. 469, 131 N. E. 602. In the language of Lord Eldon (Wilm. 65): 'Let the hand receiving it be ever so chaste, yet if it comes through a corrupt, polluted channel, the obligation of restitution will follow it.' This rule is essential to justice, otherwise a designing person could escape the consequences of his wrong by causing conveyances to be made to third persons instead of reserving them to himself. It would render it almost impossible ever to reach a case of fraud."

Addis v. Grange, 192 N. E. 744, 96 A. L. R. 607, 358 Ill. 127.

Plaintiff, a woman 57 years old, and of limited information and intelligence, conveyed in fee for an inadequate consideration, her property to defendant, reserving to herself only a life estate, believing that the deed she executed was a will. Defendant's father and mother were confidential friends of plaintiff and defendant's father had, as an attorney, transacted business for her. Held a sufficient showing of the existence of a confidential relation and undue influence arising therefrom to warrant a setting aside of the conveyance.

Armstrong v. Logan, 115 Mo. 465, 22 S. W. 384.

Grantor at the time of the execution of the deed was 69 years old, in bad health, a French Canadian, unable

to speak English. The husband of grantor died September 3, 1918. The deed in question was executed September 10, 1918, seven days after the death of grantor's husband.

"The defendant was a stepbrother of the plaintiff's husband, and, after her husband's death, it does not appear that there was anyone except the defendant upon whom the plaintiff could rely for advice . . . He was a trusted friend of plaintiff's husband . . . (and Plaintiff) naturally . . . looked to Moison. . . . It is manifest that the plaintiff relied on the defendant . . . In view of her age, ignorance of the English language and enfeebled condition she was much more susceptible to undue influence than if she had been in sound health and mentally alert.

"The findings show that the plaintiff deeded all her real estate to defendant upon no consideration except that he would provide a suitable maintenance for her . . . as stated in the deed: that, about 14 months after the deed was executed and delivered to defendant, he caused her to execute another deed releasing him from the obligations of the first, . . . the plaintiff went to live with relatives in Lynn under an oral agreement by which the defendant paid \$25 a month toward her support. Upon these undisputed facts and the other facts found by the master, and in view of the relation of trust and confidence which existed between the parties, the irresistible conclusion is that the deed in question was procured by reason of the fraud and undue influence practiced upon the plaintiff by the defendant."

Pierce v. Moison, 152 N. E. 749, 256 Mass. 528.

Testator had been left an orphan in infancy. His will, written 20 days prior to his death, left everything to his aunt and uncle with whom he resided. His sister brought suit to set aside the will. The Court said:

"The will was written by Daniel, and he and his wife are its only beneficiaries. He was the guardian of the testator, who from early infancy an orphan, had been reared and lived under his roof, as a member of his family. The will was written and executed in the testator's last illness but twenty days before his death, when recovery was doubtful, if not hopeless. Its exe-

cution was in the presence only of the family of Daniel, and when the testator had not access to, or intercourse with the relations who, by law, would have succeeded to his estate. These are all facts militating against the fairness and validity of the will, exciting the jealousy and vigilance of the court, and requiring clear and satisfactory evidence of the capacity, volition, and that the testator knew the contents of his will."

Daniel v. Hill, 52 Ala. 430.

"A fiduciary relation existing between the grantor and those concerned in securing a benefit under the terms of the grant raises a presumption against validity, and casts the burden of establishing good faith upon the person asserting the regularity of the transaction. *Clough v. Dawson*, 69 Or. 52, 60, 133 Pac. 345, 138 Pac. 233; *Jenkins v. Jenkins*, 66 Or. 12, 17, 132 Pac. 542. And the secrecy with which the transaction is accomplished often furnishes a badge of fraud. *Wolf v. Harris*, 57 Or. 276, 279, 106 Pac. 1016, 111 Pac. 54. . . . Now, we have the fact satisfactorily proven that he burned his will of his own volition and that his declared purpose in doing so was that his children should share equally in his property, Jerusha included. This was manifestly the state of his mind when he left the home of the Crabbs. In three days thereafter, he deeded his property, not to his own sons or daughter, but to the wife and daughter of one of his sons—persons who had no direct claim upon his bounty. This was absolutely contrary to all his declarations during the latter years of his life; a thing wholly unexpected, and unnatural to contemplate from his standpoint. No statement was ever made by him to any one, unless it was to Homer, that he intended to give all his property to Marvel's wife and daughter. These things are in themselves sufficient to cast the burden upon the beneficiaries under the deeds of establishing that the act of executing them was the free and voluntary act of the deceased, without instigation or direction of any other person. This the defendants have not done."

Crabb v. Watts, 249 Fed. 357; affirmed 257 Fed. 717.

2. Inequality of relationship through sickness, age, mental condition, etc. of the grantor.

From the findings of fact by the court (Appellant's App. 13, 14), it is evident that the grantor was over 80 years of age, in ill health, and an enfeebled condition and, while not of unsound mind, her feebleness of body made her all the more susceptible to the influence of her nephew, the grantee, in the deed. This finding by the Court is abundantly supported by the defendant's own testimony. He testified (Appellant's App. 34) that grantor was a sick woman while in Geneva, that she was in and out of bed (Appellant's App. 35), that she said, "I am getting tired of suffering. I have been suffering terribly," and that she wanted an operation against the doctor's advice and wanted to take a chance (Appellant's App. 36). Defendant's wife testified that grantor complained of her stomach; that she said she always had this pain in her stomach every now and then (Appellant's App. 47). At the very time of the signing of the deed, defendant's witness, Mrs. Mary A. Chacchia testified (Appellant's App. 51), "Why at the time we were there, she had a blanket on her feet and had a hot water bottle," (Appellant's App. 52), "she coughed a bit when she talked." The Rev. Michael Massabini, also defendant's witness, testified that at the time he witnessed the deed that she was complaining of stomach aches and, when asked if he ever had an opportunity to understand whether she was merely mumbling or saying something, answered, "No, just saying, 'O my God' from the pain; that is all." (Appellant's App. 57.)

On this point we ask the Court's consideration of the following authorities:

"Certain it is that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance.

"It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time in-

sane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. . . . The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law that, whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

“In the recent case of *Kempson v. Ashbee*, L. R., 10 Ch. App. Cas., 15, decided in the Court of Appeals in Chancery in England, two bonds executed by a young woman, living at the time with her mother and step-father—one, at the age of twenty-one, as surety for her step father’s debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond—were set aside as against her, on the ground that she had acted, in the transaction, without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed.”

Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260.

In a suit to set aside a conveyance on the ground of incapacity of the grantor and undue influence the court found that the grantor was upward of 75 years of age and a person of great ignorance and mental weakness, being unable to read or write or count, and cannot tell the time of day by a time piece, and does not know her age. That she was unable to count money of any kind. . . . That she was entirely ignorant of all business forms and matters and was unable to tell the name or comprehend the legal effect or character of any legal paper from having it read to her, and was entirely incompetent to do or understand any business transactions beyond the purchase of a few necessities, such as she was accustomed to buy and to look after the sale and disposition of the produce of her little farm, and in these matters she had to depend upon the honesty of those with whom she deals. She was accustomed to advise with her friends and neighbors and especially with the defendants about all her small matters and to depend upon their advice. That the consideration for the conveyance which was an annuity amounted to no more than the rental value of the property. *Held* that there being evidence to support these findings the judgment setting aside the conveyance should not be disturbed.

Kelly v. Smith, 73 Wis. 191, 41 N. W. 69.

Guenther v. Kurtz, and *Pierce v. Moison*, set out under the subdivision "Confidential relationship," also apply to the point under discussion.

3. Beneficiary preparing or procuring the preparation of the Instrument.

The person who prepared the deed was Mr. Morris Chacchia, an attorney at law, who testified that he had known the grantee, Mr. Kashouty, about 20 years and maybe more, had represented him and, at one time, had worked in Kashouty's shoe store for several years; and that he first met Fannie Deep, the grantor, on the day the deed was prepared. He further stated that it was in response to a phone

call from Mr. Kashouty that he went to see Mrs. Deep. (Appellant's App. 18, 23.)

Present when the preparation of the deed was discussed and when the deed was signed, besides Mrs. Deep, were the attorney, his then secretary (now his wife), Mary A. Chacchia, and Mr. and Mrs. Kashouty. (Appellant's App. 52.) Of the five persons in the room, Mrs. Deep spoke practically no English (Appellant's App. 23, 24); yet it is testified that a conversation of one hour and fifteen minutes duration, involving many difficult and technical propositions including the difference between a will and deed (Appellant's App. 20, 21) was carried on between Chacchia and Fannie Deep, during which time Mr. Kashouty did not, although constantly present, say a word. (Appellant's App. 53.) It is further testified that a sum of money ranging from \$1100.00 to \$1500.00 was put in Kashouty's and Mrs. Deep's joint names (Appellant's App. 24). Defendant did not know whether he handled the transfer of money or whether Chacchia did. (Appellant's App. 43, 44.)

See collection of cases in 66 A.L.R. 244, bearing on the effect of benefits to the drawer of a will. The case of *Martin v. Baker*, 135 Mo. 495, 365 S. W. 369, also bears on this point. See also *Chase v. Hubbard*, *supra*.

4. *Lack of Independent Advice if Person Mentally or Physically Sick.*

That Fannie Deep did not get independent advice on this transfer is abundantly brought out by defendant's witnesses. As has been pointed out above, the attorney Chacchia was not "independent," in that he had worked for Mr. Kashouty in his (Kashouty's) store, had represented him professionally, and had been frequently with him for more than 20 years. The priest, Reverend Massabini, testified that he had known Kashouty for the last three and a half years and that "Kashouty is the president" of his (Reverend Massabini's) church (Appellant's App. 60).

Furthermore, Reverend Massabini was not a lawyer and any advice which he gave would not meet the standard fixed by the law in cases of this kind. *Gross v. Lieber*, 165 A. 428, 112 N. J. Eq. 570.

The defendant never communicated with any of the natural objects of her bounty, viz., her children and grandchildren, with respect to her coming to live with him (Appellant's App. 39), the transfer of the real estate (Appellant's App. 41), or the transfer of the bank account (Appellant's App. 44). Certainly from those persons independent advice could have been obtained, yet the defendant, though well knowing Mrs. Deep's inability to read or write (Appellant's App. 27) and her consequent inability to communicate with them, did not, himself, inform them of these transfers, although knowing of them well in advance.

We cite the following authorities in connection with this subdivision:

Bill to set aside deed from husband to wife. Grantor at the time of the execution of the deed was sixty-seven years old and was suffering from a disease which caused his physical powers to become gradually weakened, and at the time in question he was practically helpless. The lawyer who prepared the deed was procured by a daughter of the grantee by a previous marriage, and had never transacted any legal business for either grantor or grantee but had acted as lawyer for said daughter. The daughter, Mrs. Raff, testified that she received word from her mother that the grantor wanted to see her. When she arrived she was told by grantor in the absence of grantee that he desired a lawyer and that he wanted to deed his property to his wife. The lawyer testified that he tried to persuade the grantor to make a will which he refused to do.

The deed stripped him of everything he had and deprived his nine children by a former marriage of participation in his estate.

"The deceased by the deed impoverished himself, in that he conveyed all that he had, and before the law will permit it to stand, it must be shown that he understood, was not unfairly influenced, and that he was independently and competently advised of the nature of

the act and its consequences. The lawyer who drew the deed was Mrs. Raff's lawyer. The deceased was not advised of the act and of its consequences. Mr. Schild, a witness, testified that some days before the deed was executed, the deceased advised with him and that he told deceased that he ought to deed the property to his wife. Schild is not a lawyer and his 'advice' does not meet the standards fixed by the law in cases of this kind. By proper independent advice we mean that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction. (Citing case) That kind of independent advice the donor did not receive either from Schild or the attorney Franzblau."

Gross v. Lieber, 165 A. 428, 112 N. J. Eq. 570.

In Ross v. Conway, 92 Cal. 632, 28 Pac. 785, suit was brought by the sole heir of Elizabeth G. Ross against John M. Conway the pastor of the church of which Mrs. Ross had long been a member, to set aside trust deeds of her property for the benefit of the church. The court found that a confidential relationship existed between the pastor and the deceased and applied the rule that under those circumstances there arises the presumption of undue influence. The question of independent advice was also present and the Court said, "Assuming that, by virtue of his relations to her, he had acquired an influence over her, it must be held in the transaction under investigation there was an undue exercise of such influence; that by not insisting that she should have independent advice, and by continuing to remain in her presence during the interview with the only other person whom he permitted to see her, he exercised an influence over her actions which, although unseen and inaudible were none the less effective in its results."

Grantor at the time he signed the deed was a sick man "but that he was incompetent is far from being established" "Though he was not incompetent, the condi-

tion of his health and his admitted dependence upon his wife, however, puts upon her the burden of showing that he understood what he was doing when he made the deeds and that he was not unduly influenced. If this be shown, the deed for the house, which was at the time but a part of his estate and vested the title in himself and his wife as tenants by the entirety, is sustainable, but the deed for the saloon property stands upon an entirely different footing. That was all he had remaining; he stripped himself; impoverished himself; and, before the law will permit the improvident act to stand, it must be shown, not only that he understood and was not unfairly influenced, but also that he was independently and completely advised of the nature of the act and its consequences."

McCambridge v. Daly, 156 A. 372, 109 N. J. Eq. 43.

Guenther v. Kurtz and *Daniel v. Hill* set out in the subdivision entitled "Confidential relationship" also apply to the point under discussion.

5. *Transfer Contrary to Previously Expressed Intention.*

By her last will and testament, Fannie Deep (Appellant's App. 4, 5) left the bulk of her estate to her grandchildren and to her daughter. This will was executed June 2, 1938. The deed in suit was executed September 17, 1938, an interval of three and one-half months. The relationship between Mrs. Deep and Kashouty, prior to her moving to Geneva, was, according to defendant's testimony, only "just 'hello' and 'how are you,' and that is all." (Appellant's App. 30.)

In *Hartman v. Strickler*, 82 Va. 225, the court said:

"Where a will executed by an old man differs from his previously expressed intentions, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory testimony."

See also the case of *Paddock v. Pulsifer*, 43 Kan. 718, 23 Pac. 1049 to the following effect:

In an action to cancel a deed on the ground of undue influence it was shown that the grantor had made a will dividing all his property between his children; but that while staying at the home of one of his daughters during his last sickness in which it was necessary to administer to him large quantities of whiskey and morphia, he gave her a deed for all of his land for an expressed consideration of about one-half its value, but no consideration was in fact paid. She afterwards made a voluntary conveyance to her daughter who agreed to convey to whomsoever her mother might appoint. *Held* sufficient to warrant the cancellation.

Crabb v. Watts, Morris v. Morris and Moran v. Sullivan set out under the subdivision "Confidential relationship" also apply to the point under consideration.

6. *Lack of Consideration Plus Age, Weakness, Etc. of Grantor.*

In appellant's brief, page 19, consideration is attempted to be shown. The vagueness of what Kashouty was supposed to do in consideration of the transfer of the property to him causes this to fall within the case of *Ivan Tucker and Bessie J. Tucker v. Phoebe Warfield*, No. 7417, decided by this Court March 10, 1941, ... Appeals D. C., ... F. (2d), 69 W. L. R. 370.

See also *Pledger v. Birkhead*, 156 Ark. 443, 246 S. W. 510, to the following effect:

"But mental weakness, though not to the extent of incapacity to execute the instrument designated, 'may render a person more susceptible to fraud, duress, or undue influence, and when coupled with any of these or even with unfairness, such as great inadequacy of consideration, may make a contract voidable when neither such weakness nor any of these other things alone, or of themselves would do so.' " citing cases.

And: Keller v. Cox, 67 Ind. App. 381, 118 N. E. 543, as follows:

"Where a weak, aged, or infirm person improvidently conveys her property without receiving any valuable

consideration therefor, or for a grossly inadequate consideration, and thereby deprives herself of the means necessary for her reasonable support and maintenance equity will require the reconveyance or restoration of such property . . . upon demand of the donor . . . where the parties may be placed in statu quo . . .”

B. The District Court Had Jurisdiction to Entertain this Suit.

“At the common law (which prevails in the District of Columbia), real estate descends to the heir upon the death of the ancestor and personality to the administrator.” *Cunningham v. Rodgers*, 50 App. D. C. 51, 267 F. 609.

Title to land not devised as land but directed by a testator to be sold for disposition of the proceeds to legatees vests in the testator’s heirs until a sale by the executor. *Lindenberg v. Matlack*, 15 F. Cas. No. 8360; 4 Wash. C. C. 278; *Greenough v. Wells*, 10 Cush. 571; *Cohea v. Jemison*, 68 Miss. 510, 10 S. 46; *Allen v. DeWitt*, 3 N. Y. 276.

Thus, the title to the land in this case being in the plaintiffs, they have the right to maintain a suit for the removal of a cloud upon their title.

Further, “rents accruing after the death of the testator are real estate, and as such without the jurisdiction of the Probate Court, unless there is not sufficient personal property to pay the debts.” *Brosnan v. Fox*, 52 App. D. C. 143; 284 F. 923; *Shields v. Shields*, 69 App. D. C. 331; 101 Fed. (2) 255. Therefore, the heirs have a right to maintain this action as they have in any event the right to receive the rents from the time of the death of Mrs. Deep to the time of sale by the executor.

This case can be likened to one where a cloud is cast upon the title of a piece of real estate when the title is in A. Upon A’s conveyance of the property to B, the latter would be the proper party to bring a suit for the removal of the cloud and A would have no standing in court. Upon Mrs. Deep’s death her title to the property is extinguished to the same

effect as if she had conveyed the property to her heirs. Therefore, the heirs of Mrs. Deep who now have the legal title to the property are the proper parties to bring a suit, rather than Mrs. Deep's personal representatives.

The purpose of Title 24, Section 31 of the Code of Laws for the District of Columbia is to keep alive actions which formerly abated upon death. The section itself is entitled "Abatement of Actions." The type of action in the instant case would not have abated prior to the statute. (See cases collected in 2 A. L. R. 431 and 33 A. L. R. 51.)

Had Mrs. Deep died without leaving a will, her heirs and not her administrator would have been the proper persons to bring the suit. In *King v. Boyd*, 4 Or. 326, a suit for the cancellation of a deed on the ground of mental incapacity and fraud was brought by the administrators of the grantor, and the suit was dismissed with the remark that the heirs were the proper parties to sue in such suit. Therefore, if an administrator is not the proper party to bring a suit for the removal of a cloud upon real estate, an unqualified executor would have no better right.

"Title to real estate is in the heirs and to the personal property in the administrator de bonis non. Whether a conveyance to 'the estate of Emma Zärtner' would vest title, if indeed it passed any, is at least very doubtful. *Jones v. Beale*, 217 Pa. 182, 66 Atl. 254.

"This court has adhered rather firmly to the rule that real estate descends to the heirs immediately upon the death of the donor, subject, however, of course to the debts of the deceased owner and in a proper case to the discharge of specific legacies.

" * * * The precise question here under consideration seems not to have been raised very often. A question somewhat analogous to it is presented in *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401. There the administrator of the defrauded decedent joined in an action to set aside a fraudulent conveyance, and the joinder was sustained only upon the theory that the estate was composed of both personal and real property. The court said: 'It is necessary that the rescission should apply so far as practicable to the whole

transaction in order that justice be done to all parties, and it is proper that those who are interested in either kind of property should be parties to the bill, so that the court may have the whole case before it, and that both the person entitled to the real estate and he who is entitled to the personal estate should be bound by the result.' * * *

"It was said in *Brigham v. Hunt*, 152 Mass. 257, 25 N. E. 468: 'Except in cases where an administrator has been licensed to sell real estate to pay debts, or where real estate is held as security under a mortgage, an administrator has no interest in the lands of his intestate, and cannot maintain an action to recover them.' "

Neelen v. Holzhauer, (1927) 193 Wis. 196, 214 N. W. 497, 53 A. L. R. 359.

A practical reason for the maintenance of this suit by the heirs, rather than by the personal representatives of the decedent is that during the time necessary for the appointment of an administrator or executor, the defendant in this suit could dispose of the property to an innocent purchaser for value. As is pointed out in the case cited by appellant, personal representatives do not include collectors, and only administrators and executors come within the definition. Therefore, more than 30 days would be apt to elapse, which would be more than sufficient time for the successful disposition of this property by defendant.

The determination of the validity or invalidity of the will as a condition precedent to the bringing of this suit is unnecessary. This can best be shown by stating that the heirs at law and legatees under the will of Fannie Deep would find themselves in no different position if the judgment of the lower court is affirmed than they would if Fannie Deep had not made the deed to Kashouty. All that is sought by this suit and all that the judgment of the court below in fact does, is to declare the deed from Fannie Deep to John B. Kashouty invalid, void and of no effect. There is no requirement that Kashouty deed the property to either the heirs at law, the executor named in the will or the devisees

and beneficiaries of the will. The opinion of Mr. Justice Bailey (Appellant's App. 13) recognizes that "any recovery of the title to the land by the plaintiffs will be subject to the provisions of any will that may be probated." The heirs at law, if the judgment is affirmed, will have no more facility for disposing of the property than they would have had, if Mrs. Deep had not deeded the property to Kashouty. In fact, the filing of this suit in the court below gives notice to any prospective purchaser of the existence of the will and any conveyance by the heirs could not, therefore, deprive the beneficiaries under the will of whatever rights they may have.

Practically, it would be needlessly expensive, in both money and work, to require a determination of the validity or invalidity of the will. There is an excellent chance that a caveat will be filed to the petition for its admission to probate. Should this work and money be expended only to have the court later decide that the conveyance to the defendant herein is valid and that therefore the administrator has nothing on which to administer, or the executor nothing on which the will can operate?

Considerable space is devoted by appellant to the proposition that the question of the validity of the will could not properly be raised before the lower court. There was not a shred of testimony tending to show whether the will was valid or invalid. The object of the suit had nothing to do with the validity or the invalidity of the will. The judgment of the court deals not at all with the validity or invalidity of the will but concerns itself solely with the validity or invalidity of the deed to the defendant John B. Kashouty, and the method by which he obtained said deed.

C. A Physician May Not Testify as to Things Learned by Him While Assisting Another Physician in Making an Examination.

The purpose of Dr. Hudson seeing Mrs. Deep was that, as he spoke Arabic, Dr. Munford thought he might help him in the diagnosis and conduct of her case. (Appellant's App. 65.) He was therefore acting as a physician. Under the circumstances, Title 9, Section 20 of the District of Columbia Code (Appellant's brief, page 10) precludes his testimony.

Eureka-Maryland Assurance Corp. v. Ethel Gray, No. 7642, decided by this court June 16, 1941; *Hutchins v. Hutchins*, 48 Appeals D. C. 495.

CONCLUSION.

No one can read the record in this case without being convinced of the presence of undue influence. The cases cited above are remarkably similar to the instant case. The procedure adopted by appellees was the correct one and no error was committed in the matter of the admission or exclusion of evidence.

It therefore follows that the judgment of the lower court was correct and should be affirmed.

Respectfully,

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